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RECORD, CASE No. 13,477.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 319.

THE FRANKLIN TELEGRAPH COMPANY, THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY, AND THE WESTERN UNION TELEGRAPH COMPANY, APPELLANTS,

vs.

JOHN HARRISON, GEORGE L. HARRISON, AND THOMAS S. HARRISON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JANUARY 15, 1889.

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1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Brothers and Company, all Citizens of the State of Pennsylvania,

vs.

THE FRANKLIN TELEGRAPH COMPANY, Citizens of the State of Massachusetts, Incorporated by that Name by the said State; The Atlantic and Pacific Telegraph Company, Citizens of the State of New York, Incorporated by that Name by the said State, and The Western Union Telegraph Company, Citizens of the State of New York, Incorporated by that Name by the said State.

No. 26. October Session, 1882.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania*, } *ss:*

2 Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1882, No. 26.

It is thus contained:

Be it remembered that on the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and eighty-two, John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers and Company, by their solicitors, S. S. Hollingsworth, Esquire, and R. C. McMurtrie, Esquire, come into court here and file their bill of complaint against the Franklin Telegraph Company, the Atlantic and Pacific Telegraph Company, and the Western Union Telegraph Company in the words and figures following, to wit:

3 United States Circuit Court, Eastern District of Pennsylvania. In Equity.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Brothers & Co.,

vs.

THE FRANKLIN TELEGRAPH COMPANY, THE Atlantic and Pacific Company, and The Western Union Telegraph Company.

No. 26. October Sessions, 1882.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

John Harrison, George L. Harrison, Jr., and Thomas S. Harrison,

trading as Harrison Brothers & Co., all citizens of the State of Pennsylvania, bring this their bill against the Franklin Telegraph Company, citizens of the State of Massachusetts, incorporated by
4 that name by the said State, and having their principal place of business therein; the Atlantic and Pacific Telegraph Company, citizens of the State of New York, incorporated by that name by the said State, and having their principal place of business therein, and the Western Union Telegraph Company, citizens of the State of New York, incorporated by that name by the said State, and having their principal place of business therein.

And thereupon your orators complain and say—

I. That on and before the twenty-first day of May, A. D. 1867, your orators, together with George Harrison and M. Leib Harrison (now deceased), were copartners, doing business under the name and style of Harrison Brothers & Co.; that on the said day, to wit, on the twenty-first day of May, A. D. 1867, the said firm of Harrison Brothers & Co., so as aforesaid constituted, entered into a contract with The Franklin Telegraph Company, one of the defendants herein, as follows:

"Memorandum of agreement, made this twenty-first day of May, in the year of our Lord one thousand eight hundred and sixty-seven (1867), by the Franklin Telegraph Company, for their own account and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Junior, and Thomas S. Harrison, trading as Harrison Brothers & Company, manufacturing chemists of Philadelphia, of the other part, witnesseth:

"That the party of the first part, for and in consideration
5 of the relinquishment by the parties of the second part to the party of the first part of a valuable contract made by the party of the second part with the Insulated Lines Telegraph Company, hereby grants to the party of the second part the right to put up, maintain, and use a telegraphic wire between the cities of New York and Philadelphia upon the poles of the Franklin Telegraph Company or of the Insulated Lines Telegraph Company or of those persons or corporations whose property has lately been purchased by or consolidated into the stock of the party of the first part, and the party of the second part are privileged, at their option, to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of the said wire for transmission of messages free of all expense, the party of the first part to have the use of the same when not so employed; and, in consideration of allowing the use of said wire to the party of the first part when they, the said parties of the second part and the licensees aforesaid, are not using the same, the party of the first part agrees, said wire having first been put up to the acceptance of J. G. Smithe, the superintendant of said Franklin Telegraph Company, and accepted by him, to keep and maintain, at their own expense, the said wire in good working order to and between the offices of the parties of the first part in New York and Philadelphia and between said

office- and the places of business of the parties of the second part and such four other persons or firms in the said cities of New York and Philadelphia, all expenses of batteries, &c., connected with the working of said wire to be paid by the parties of the first part. At the
6 expiration of ten years the party of the second part agree that their private wire shall belong to the parties of the first part; after which time the parties of the first part agree to lease the same to the party of the second part, for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part.

"The party of the second part, however, agree that no assignment by them of their right under this contract shall give their assignees the right to demand a lease of the said wire after the expiration of the ten years, which right is to be a personal privilege of the party of the second part or of that firm for the time being.

"It is further agreed that the right of giving the use of the wire to four other parties shall be exercised by the party of the second part or their assignees only by giving the same to any person or firm not being a telegraph company, a banker, or stock or exchange broker or railroad company.

"And in case the party of the second part shall procure a charter to carry on the business they are now engaged —, or a similar business, the privileges and rights of the party of the second part shall enure to said corporation in like manner as if such corporation had been named as the party of the second part herein.

"In case of any disagreement on that or any other point embraced in this contract the decision of the same shall be left to two disinterested persons mutually chosen by the parties hereto, with a right to call in a third as umpire, whose decision shall be final.

7 "In case those objections are held valid by the arbitrators and not acquiesced in by the parties of the second part the party of the first part reserves the right to purchase the said wire at a fair valuation, to be determined by referees in the same manner as any other matter in this agreement; with the above exception, the party of the second part has the right of transfer.

"No change in the firm or firm name of the party of the second part or those interested through them by death or retirement or by addition of members to said firm or from other cause shall vitiate the right or title of the party of the second part under this contract or destroy its continuance in full force to such new firm and the members thereof as if they were named herein.

"The parties of the second part and those interested through them are not to do other than their own legitimate mercantile and personal business. Should they be willing to transmit any other messages they are to charge the company's regular tolls and hand the same over weekly to the proper officers of said companies without discount or diminution.

"In case of a violation of this contract in this respect by the party

of the second part or their licensees they shall respectively pay the parties of the first part four times the current rates of similar messages and the expenses of recovering the same as liquidated damages, and if this should continue and be found by arbitration to have been intentionally persisted in it shall terminate this contract against the offending party, whether Harrison Bros. & Co. or either of their licensees.

"It is agreed by the Franklin and Insulated Lines Telegraph Companies that no debts at present made or hereafter con-
8 tracted shall in any way affect or injure the rights of the parties of the second part under this agreement or impair their title to the wire put up by them on the poles of said companies.

"In case the said wire shall at any time be out of order or incapable from any cause of being used the parties of the first part will transmit the messages of the party of the second part and their licensees from any of their offices to and from New York and Philadelphia, in regular turn with all other messages received for transmission, free of all charge and expense.

"In witness whereof the said parties of the first part have hereto caused to be affixed their corporate seal. Dated the day and year aforesaid.

"THE FRANKLIN TELEGRAPH COMPANY,

[SEAL.] "By JOSEPH B. STEARNS,

"*Its President.*"

In presence of—

——— ———.

[U. S. R. stamp, 5c.]

II. That at the time said contract was made the said Franklin Telegraph Company owned and operated a line — telegraph from Boston to New York; that the Insulated Lines Telegraph Company owned and operated a line of telegraph from Boston to New York and from New York, via Philadelphia, to Washington; that the said last-mentioned company were heavily indebted and unable to maintain their
9 wires south of New York and desired to consolidate with said Franklin Telegraph Company; that there were two obstacles in the way of such consolidation, to wit, an outstanding contract between said Harrison Brothers & Co. and said Insulated Lines Telegraph Company, imposing upon said last-mentioned company a burden which said Franklin Telegraph Company was unwilling to assume, and a want of money to put up an efficient wire between Philadelphia and New York; that said contract of May 21st, 1867, was made by said Franklin Telegraph Company with said Harrison Brothers & Co. for the purpose of having rescinded the said contract between the said Insulated Lines Telegraph Company and said Harrison Brothers & Co. and in order to secure the erection of a wire upon the poles of said company between New York and Philadelphia by and at the expense of said last-mentioned firm.

III. That the effect of said contract was to rescind said old contract between said Insulated Lines Telegraph Company and Harri-

son Brothers & Co.; to impose upon said Harrison Brothers & Co. the duty of erecting at their own expense a wire on the poles of said Franklin Telegraph Company between the cities of New York and Philadelphia, including the laying of a cable across the North river, for the use of said company at such times as the same was not being used by said Harrison Brothers & Co. or either of their four licensees, and to give said Harrison Brothers & Co., their successors and licensees, the priority in the use of said wire for the period of ten years from the date of said contract, free of charge, and thereafter to give them, their successors and licensees, the same right as long as they desired to enjoy it, by paying therefor the sum
10 of six hundred dollars a year to said Franklin Telegraph Company, the said company being bound to maintain in good working order this wire or any wire they might substitute for the same.

IV. That your orators are the successors in business of said Harrison Brothers & Co. and have succeeded to all their rights and liabilities and are informed and believe and aver that they are now vested with all the rights conferred by said contract in said firm of Harrison Brothers & Co.

V. That by an instrument under seal dated the fourteenth day of June, A. D. 1876, the said Franklin Telegraph Company leased all its property and franchises to The Atlantic and Pacific Telegraph Company, a defendant herein, for the term of ninety-nine years from the first day of May, A. D. 1876, whereby the said lessee became chargeable with the obligation to maintain said wire for the use of your orators and their licensees, in accordance with the terms of the contract set forth.

VI. That on the nineteenth day of January, A. D. 1881, the said Atlantic and Pacific Telegraph Company sold and transferred all the property and franchises (except the franchise to continue its corporate existence) to The Western Union Telegraph Company, a defendant herein, whereby the said Western Union Telegraph Company became chargeable with the obligation to maintain said telegraph wire between the cities of New York and Philadelphia for the use of your orators or their licensees, as in said contract already set forth provided.

11 VII. That the said firm of Harrison Brothers & Co. and their successors, your orators, have done and performed all the things to be done and performed by them under said contract, the said firm having at great expense put up the said wire on the poles of the said Franklin Telegraph Company between the cities of New York and Philadelphia, and the said firm and your orators have in respects observed and complied with the terms of said contract.

VIII. That no written lease has ever been executed for the use of said wire by your orators (who succeeded said firm of Harrison Brothers & Co. in January, 1877), but since May 21st, 1877, at which time the period of ten years from the date of said contract expired, your orators have enjoyed the use of said wire and have

regularly paid therefor to the Atlantic and Pacific Telegraph Company an annual sum of $600.

IX. That on the twentieth day of August, 1880, your orators received from the Atlantic and Pacific Telegraph Company the following letter, viz:

"Atlantic and Pacific Telegraph Company, executive office.

"NEW YORK, *August 19th*, 1880.

'Messrs. Harrison Bros. & Co., 105 South Front street, Philadelphia, Pa.

"GENTLEMEN: In the contract entered into between your house and the Franklin Telegraph Company in May, 1867, it was contemplated that the telegraph company should have the use of the wire leased during a considerable portion of the time, in consideration of which the telegraph company were to maintain the line in working order and furnish battery power therefor.

"Your own business and that of your licensees has deprived us more and more of the use of this wire until we find ourselves furnishing the exclusive use of a wire between New York and Philadelphia, maintaining and supplying battery for it, for the sum of $600 per annum.

12 "As this cannot be afforded and was not contemplated by the contract, and as the contract fixes no limit of continuance, we respectfully give notice that we shall consider it terminated from and after the 21st of November next, being the end of the next quarter.

"Should you desire to continue the connection we shall be glad to accommodate you upon as favorable terms as can be afforded, and would like to have your decision at an early day, that we may make suitable provision for you, if desired, upon our new and substantial line now in process of construction.

"Yours very truly, A. B. CHANDLER, *President.*"

That to this letter your orators replied on October 25th, 1880, as follows, viz:

"PHILADELPHIA, *October 25th*, 1880.

"Albert Chandler, Esq., president Atlantic & Pacific Tel. Co., N. Y.

"DEAR SIR: Your letter of the 14th inst. at hand. When it reached us our Mr. Thomas S. Harrison, who had the pleasure of meeting you in New York, was absent from the city, and it only had his attention the latter days of last week.

"We are sorry that you still insist on your view of our rights under the contract. We had hoped that the views that we lately presented to you would, when you come to think the matter over, convince you. We see no way, however, of settling the case except by having the meaning of the contract decided. We suggest, therefore, that an amicable suit be instituted for this purpose, and that your notice be extended so as to cover the time necessary to make a decision. If, in the meanwhile, you have any substitute to propose for the existing arrangement we shall be glad to consider it. We

desire that the pleasant relations that have existed between us may not be disturbed, and think that our suggestion will meet with your approval.

"Yours truly, HARRISON BROS. & CO."

That nothing further was done to interfere with your orators' rights in the premises until May 20th, 1882, when your
13 orators received from the Franklin Telegraph Company a written communication that said contract of May 21st, 1867, would be terminated on November 21st, 1882, as follows, viz:

"To Messrs. Harrison Bros. & Co., Philadelphia, Pa.

"GENTLEMEN: You will please take notice that the Franklin Telegraph Company desires to terminate the agreement heretofore and on the twenty-first day of May, one thousand eight hundred and sixty-seven, executed between themselves and you, and that the same will be so terminated on the twenty-first day of November, one thousand eight hundred and eighty-two.

"Dated New York, May twentieth, one thousand eight hundred and eighty-two.

"(Signed) THE FRANKLIN TELEGRAPH COMPANY,
"By A. B. CHANDLER, *President.*"

X. That since said notice of May 20th, 1882, your orators have had several interviews with the officers and attorney of the said companies, defendants herein, in regard to the right of any of them to terminate said contract, but have been unable to induce them to recede from their claim of a right to terminate said contract at their option after a reasonable notice. The said companies have agreed to extend the time when said notice of May 20th, 1882, shall go into effect until the first day of December, A. D. 1882.

XI. That in answer to the pretense set up in the notices or letters above stated, that because no time was fixed for terminating the right of said Harrison Brothers & Co., therefore it was to continue only for reasonable time after a notice to terminate said contract, your orators charge that at the time said contract was made it was discussed in the negotiation whether a right to determine said contract at any time after the expiration of ten years from the date thereof should be reserved to said Franklin Telegraph
14 Company, and it was agreed that it should not, but that such right should belong only to said Harrison Brothers & Co. or their successors, and to carry out and evidence this understanding and agreement the document was written and executed which has already been set forth in this bill.

XII. That they are advised and aver that the nature of the subject and the grant precludes the application of this rule in the construction of this contract; that the grant is of an indefinite right to the use of a permanent structure to be put up by your orators' predecessor in title and become the property of the defendant The Franklin Telegraph Company, and it is most unreasonable to infer that

there was an implied stipulation that the owners thus acquiring title to property could avoid the payment of the consideration to come from them by terminating the contract, the right to the use of the wire by your orators being the price to be paid by them.

XIII. That the defendants have given notice of their intention to terminate said contract on the first day of December, 1882, and to deprive your orators of the use of said wire; and your orators charge that the said defendants will, unless restrained by the order of this court, deprive your orators of the use of said wire on and after December 1st, 1882, and your orators aver that the right to use said wire is extremely valuable to your orators, to wit, over the value of $20,000, and the remedy at law for the breach of said contract by the defendants is entirely inadequate.

To the end, therefore, that the said defendants may each
15 of them, if it can, show why your orators should not have the relief hereby prayed and may, according to the best of its knowledge, information, and belief, but not under oath, the benefit whereof is hereby expressly waived, full, true, and perfect answer make to the several matters and things hereinbefore set forth as fully as if particularly interrogated respecting the same;

And that the said contract of the defendant the said Franklin Telegraph Company to maintain in good working order a telegraph wire between the cities of New York and Philadelphia for the use of your orators and their licensees according to the terms of said contract may be specifically performed, your orators hereby undertaking to perform their undertakings in the premises, and that the said defendants, The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company, and each of its servants, attorneys, agents, and workmen may be restrained by writs of injunction issuing out of this honorable court, preliminary pending the determination of this cause and perpetual thereafter, from terminating or in any way interfering with your orators' use of a telegraph wire upon the poles of said defendants between the cities of New York and Philadelphia, and may be directed to maintain such wire in good working order for the use of your orators and their licensees;

And that your orators may have such other and further relief as the nature of the case may require and to your orators may seem meet—

May it please your honors to grant unto your orators not only the writs of injunction conformably to the prayer of this bill, but also the writs of subpœna issuing out of this honorable court, to be di-
rected to The Franklin Telegraph Company, a corporation
16 organized under the laws of the State of Massachusetts; The Atlantic and Pacific Telegraph Company, a corporation organized under the laws of the State of New York, and The Western Union Telegraph Company, a corporation organized under the laws of State of New York, commanding them and each of them, at a day to be named therein, to be and appear before this honorable court, and then and there to answer this bill of complaint and to

do and receive what to your honors may seem meet in the premises.

HARRISON BROTHERS & CO.,
By S. S. HOLLINGSWORTH, *Solicitor.*

R. C. McMURTRIE,
S. S. HOLLINGSWORTH,
Of Counsel.

17 (Endorsed:) No. 26. October sessions, 1882. United States circuit court, eastern district of Pennsylvania. In equity. John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co.; *vs.* The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company. Bill of complaint. S. S. Hollingsworth, R. C. McMurtrie, of counsel. Filed Nov. 29, 1882.

18 And afterwards, to wit, on the twenty-third day of June' in the year of our Lord one thousand eight hundred and eighty-three, the respondents, by their solicitors, Rudolph M. Schick, Esquire, and Benjamin Harris Brewster, Esquire, come into court here and file the joint and several answer of The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company in the words and figures following, to wit:

19 In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Brothers & Co., *vs.* THE FRANKLIN TELEGRAPH COMPANY, THE ATLANTIC and Pacific Telegraph Company, and The Western Union Telegraph Company.	October Sessions, 1882. No. 26.

The joint and several answer of The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto say:

I. It is true that the contract set out in paragraph I of bill was made as it is therein set out.

20 II. The telegraphic wire erected by the said plaintiff under the said agreement consisted of the wire, the insulation thereof, and a cable under the North river in order to complete the line of communication into the city of New York. The cable under the North river became worn by long use and was no longer serviceable, so that the defendants were compelled to abandon the use thereof, and the same has since been taken up and removed. The insulation of the wire erected by plaintiffs as aforesaid also, by long

use, because unserviceable, and a new insulation was substituted by defendants, and finally the wire itself, by long use, became imperfect, unreliable, and no longer fit for use and was taken down by defendants, and defendants aver that before the commencement of this suit every part of the telegraphic line erected by the plaintiffs under the said agreement had been taken down and removed for the reasons aforesaid, and not any part of it is now in use.

II. Defendants further allege that the cost to the plaintiffs of erecting the said wire could not properly have exceeded the sum of $3,000, and that the expense to the said defendants of keeping and maintaining the same in good working order and the expenses of batteries, &c., connected with the working of the said wire, which were paid by the said defendants, amounted to the sum of $600 per annum between the twenty-first day of May, 1867, and the twenty-first day of May, 1877, and that the telegraphic facilities furnished to the said plaintiffs and their licensees during the same period were of value to the said plaintiffs of $600 per annum.

III. The facts averred in the second, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of complainants' bill are admitted to be true so far as they are material to this bill.

21 IV. The defendants are advised that the allegations in the eleventh paragraph of complainants' bill are not admissible to be proved, because they are a contradiction and a change of and an addition to the contents of a written agreement, and they ask that this paragraph be regarded in the same manner and with the same effect as if they had specially demurred thereto, but, reserving to themselves the advantage of the foregoing as a demurrer, the Franklin Telegraph Company denies and the Atlantic and Pacific Telegraph Company and the Western Union Telegraph Company are ignorant of and if material and competent to be proved in the cause ask that it may be proved that at the time said contract was made it was discussed in the negotiation whether a right to determine said contract at any time after the expiration of ten years from the date thereof should be reserved to said Franklin Telegraph Company and it was agreed that it should not, but that such right should belong only to Harrison Brothers & Co. or their successors, and to carry out and evidence this understanding and agreement the document was written and executed which is set out in said bill.

V. The facts alleged in the thirteenth paragraph of complainants' bill are admitted to be true, except the allegation that the right to use said wire is extremely valuable to the complainants, to wit, over the value of $20,000, as to which these defendants are ignorant, and ask that the same may be proved if material to the cause.

All which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

RUDOLPH M. SCHICK,
BENJAMIN HARRIS BREWSTER,
Solicitors for Defendants.

22 (Endorsed:) No. 26. October sessions, 1882. In the circuit court of the United States for the eastern district of Pennsylvania. In equity. John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., *vs.* The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company. The joint and several answer of The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and the Western Union Telegraph Company. Rudolph M. Schick, Benjamin Harris Brewster, solicitors for defendants. Filed June 23, 1883.

23 And afterwards, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three, the complainants, by their solicitors, come into court here and file their replication in the words and figures following, to wit:

24 United States Circuit Court, Eastern District of Pennsylvania.
In Equity.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Brothers & Co.,	
vs.	No. 26.
THE FRANKLIN TELEGRAPH COMPANY, THE Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.	October Sess., 1882.

The replication of John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., complainants, to the joint and several answer of The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company, defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and ad-
25 vantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the said joint and several answer of the said defendants, for replication thereunto say that they do and will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the said answer of the said defendants is uncertain, evasive, untrue, and insufficient in the law to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this

honorable court may direct, and humbly pray as in and by their said bill they have already prayed.

S. S. HOLLINGSWORTH,
R. C. McMURTRIE,
Solicitors and Counsel for Complainants.

Philadelphia, June 28th, 1883.

26 (Endorsed:) No. 26. October sessions, 1882. United States circuit court, eastern district of Pennsylvania. In equity. John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., *vs.* The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company. Replication. S. S. Hollingsworth, R. C. McMurtrie, of counsel. Filed July 14, 1883.

27 UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Pennsylvania. In Equity.

JOHN HARRISON *et al.*
vs.
THE FRANKLIN TELEGRAPH CO. *et al.* } Oct. Session, 1882. No. 26.

The deposition of Charles H. Burd, of Boston, Massachusetts, taken before William S. Otis, notary public, is taken with same force and effect as if taken before a special examiner appointed by the court.

S. S. HOLLINGSWORTH,
For Complainants.
RUD. M. SCHICK,
Attorney for Defendants.

July 12th, 1883.

CHARLES H. BURD, being first duly sworn, testified as follows:

(Complainant proposes to prove by this witness that at the time of the execution of the contract of the 21st of May, 1867, set out in the bill of complaint, it was discussed in the negotiation whether a right to determine said contract at any time after the expira-
28 tion of ten years from the date thereof should be reserved to the Franklin Telegraph Company, and it was agreed that it should not, but that such rights should belong only to said Harrison Bros. & Co. or their successors, and that to carry out and evidence this understanding and agreement the document set forth in the bill and bearing date twenty-first day of May, 1867, was written, executed, and delivered.)

(Mr. Schick, for the defendants, objects to any proof as to such facts as incompetent and irrelevant, as additional to the terms of the written agreement.)

Int. 1. Please state your name, age, residence, and occupation.

A. Charles H. Burd; forty-seven years; Boston, Mass.; inspector of customs.

Int. 2. In 1867 what business were you engaged in?

A. Telegraph business; general agent for the Franklin Telegraph Company of Boston.

Int. 3. Please state in your own way, as fully as you can, all the facts relating to the consolidation of the Insulated Lines Telegraph Company and the Franklin Telegraph Company, and also relating to the execution of the contract of May 21st, 1867, between Harrison Bros. & Co. and the Franklin Telegraph Company.

A. The Franklin Telegraph Company originally owned two wires from here to New York and were doing a paying business; the Insulated Lines Telegraph Company owned four wires from Boston to New York and four wires running South from New York to Washington through Philadelphia; they had a large bonded indebtedness, a large floating debt, and were losing money right along. They made overtures to the Franklin Company for a consolidation of the two companies, to assume the name of the Franklin Company and be under the management of the officers of the Franklin Company.

29 While the negotiations were pending I made necessary tests of the insulated wires between Boston and New York, and it was then thought best that I should go on to the southern end of the line to ascertain the condition of its wires, force employed, and general condition of its business. I selected Philadelphia for the reason that it was a central point and the manager of the office there was an old friend of mine and I thought it would aid me in obtaining the facts. Mr. Waters, president of the Insulated Lines Company, wished me on my arrival in Philadelphia to inquire into and ascertain the facts regarding a contract which had been executed between Harrison Bros. & Co., of Philadelphia, and the Insulated Lines Telegraph Company.

Int. 4. What became of that contract?

A. I brought it to Boston from Philadelphia and gave it to the Insulated Lines Telegraph Company.

(Complainants' counsel here calls for said contract.

Mr. Schick answers that he has had no previous notice to produce the contract, and cannot do so now because he has not it in his possession.)

Int. 5. Please state what, after reading that contract, objection, if any, there was to the proposed consolidation.

A. The contract was of such a nature, granting such privileges to Harrison Bros. & Co., that the Franklin Company was unwilling, so long as the contract existed, to make any consolidation with the Insulated Lines Company.

I told Mr. Harrison we would not acknowledge any such contract, to carry out its terms. This was before the consolidation was consummated and while negotiations were pending.

There was considerable delay in the negotiations owing to the difficulties of the details at this time. Pending the settlement Mr.

30 Harrison, of Harrison Bros. & Co., threatened to bring suit on their contract with the Insulated Lines Company in case

either that company or the consolidated companies should fail to comply with its terms. I then reported to the Franklin Company the condition of the Insulated Lines property south of New York, and explained to them the provisions of the contract between that company and Harrison Bros. & Co. I then received instructions from them to open negotiations with Harrison Bros. & Co. with a view to the relinquishment of the contract between them and the Insulated Lines Company.

Mr. Harrison asked me what we would allow him to put a wire on our poles for (Mr. Schick objects to any conversation between the parties leading up to the making of the contract) between Philadelphia and New York, and negotiations were then commenced which finally ended in the contract of May 21st, 1867.

I was at this time acting as general agent for the consolidated companies. The negotiations had so far progressed with Harrison Bros. & Co. that it had been agreed that their contract with the Insulated Lines Company should be given up before the consolidation had been consummated.

The contract between Harrison Bros. & Co. and the Franklin Company, as the different points of it were settled between me and Harrison Bros. & Co., was from time to time submitted to the directors of the Franklin Company, in Boston, for their approval. I would send on a draft to the president in Boston and they would suggest any alterations and changes. I would take it to Mr. Harrison and discuss it until it was satisfactory.

(Papers shown witness.)

Int. 6. Is this paper marked "Exhibit A., W. S. O.," one of the drafts of the contract drawn up between you and the Harrisons?

A. Yes.

31 (Paper offered in evidence and marked "Exhibit A, W. S. O.," and objected to by Mr. Schick.)

Int. 7. Was any discussion had between you and the directors of the Franklin Company, either before or after the consolidation, in regard to the continuance of the contract after the expiration of ten years from its date; and, if so, what was the conclusion reached?

(Objected to by Mr. Schick.)

A. Yes; it was discussed. Our urgent need of a good wire south from New York was so great, the other wires being poorly insulated, the company having no money of its own to reinsulate them, that it was decided to make the best terms possible with Harrison Bros. & Co. and let somebody else take care of them ten years later. It was decided that they should have the right to lease the wires—by "they" I mean Harrison Bros. & Co.—after the ten years, paying a fair rate for the use of the wire.

Int. 8. How long was the lease to be?

(Objected to by Mr. Schick.)

A. There was no limit. We thought Mr. Harrison wished to

spread-eagle a little, and we had no idea that he would continue to use it after three or four years, and we then hoped to be in a condition to buy it cheap—that is, with a reduction for the use of the wire.

Int. 9. Was the question of reserving to the Franklin Company the right to determine the lease at any time after ten years discussed?

A. Yes; Mr. Stearns, Mr. Smith, Mr. Brown (directors or officers of the company), and I discussed it.

The conclusion reached was we did not care what happened after the ten years; but we could afford to give Harrison Bros. & Co. liberal terms at the end of ten years for the benefit that would accrue to the company at the time the contract was made.

Int. 10. Did the liberal terms that you determined to give
32 them embrace a reservation to the Franklin Company of a right to determine their lease at any time after the end of the ten years?

(Objected to by Mr. Schick as leading, besides irrelevant and incompetent.)

A. No.

Int. 11. How was the amount of the rental fixed?

A. It was based on six per cent. of the $10,000, the estimated cost of the wires.

Int. 12. Will you kindly state what is generally meant by the maintenance of the wire?

A. Keeping it in working order.

Int. 13. This includes, does it not, putting in new insulators and new wires when necessary?

(Objected to by Mr. Schick as leading.)

A. No; I think it would include putting on new insulators where they were broken and putting in new wire at places where they were breaks and the wire taken away. It would not include putting up an entire new wire.

It would include maintaining the old wire, but not putting a new one in its place.

Int. 14. Does a telegraph wire become unfit for use by age?

A. Everything becomes unfit from age.

Int. 15. What is the ordinary duration of a wire from Philadelphia to New York?

A. I am not competent to answer that; I was not in the business long enough.

Int. 16. If a wire is kept in good order by replacing wire in parts where broken and taken away and by replacing insulators where broken, will not the line continue fit for use so long as such maintaining care is exercised?

(Objected to by Mr. Schick as leading.)

A. Yes.

33 Cross-examination.

By Mr. SCHICK:

I do not remember how long I was in Philadelphia nor the date when I left. I had my negotiations with Thomas S. Harrison, one of the firm. I acted alone in Philadelphia in behalf of the telegraph companies.

Cross-int. 1. In answer to Int. 8, as follows, "How long was the lease to be?" you have answered as follows: "There was no limit." Did you mean by that that the duration of the lease to be granted was not fixed by the officers and directors of your company?

A. No; the intention was that Harrison Bros. & Co. could lease the wire for as long as they wanted. That was the understanding.

Cross-int. 2. Did you deliver the contract after it was executed to Mr. Harrison?

A. I do not recollect. I think it was forwarded by mail by Mr. Stearns, the president of the company.

CHARLES H. BURD.

EXHIBIT A. W. S. O.

Memorandum of an agreement made May 1st, 1867, for approval by the Franklin Telegraph Company and the Insulated Lines Telegraph Company of Boston, Mass.

Harrison Bros. & Co. to have the use of one wire now up between New York and Philadelphia for three months, at the rate of six hundred dollars per year, payable monthly; they and those interested with them (not exceeding two others in this instance) to furnish operators, &c., in each cities.

34 During the said three months or such additional necessary time Harrison Bros. & Co. will have the right to put up a well-insulated wire between Philadelphia and New York and be privileged at their option to allow four other parties or firms to use the same with them, having in all cases on their own wire, they and their co-operators, the priority in the use of same free of all expense to them in consideration of allowing the use of said wire to the said companies free of expense when they and their co-operators are not employing it for their own mercantile benefit, they, the said companies, further agreeing to keep the said wire in good working repair without cost to Harrison Bros. & Co.

In case Harrison Bros. & Co. should not have their private wire put up within three months from 15th instant they lose the right to use the wire now up belonging to the Franklin and Insulated Lines Telegraph Companies, and this agreement is canceled until they put up their said wire.

Harrison Brothers & Co. to pay one hundred dollars for connecting their offices in New York and Philadelphia with the companies' main offices in said cities, and when their own wire is put up such additional sum, if any, as will cover the expense in wire and labor and insulation that may have been expended by the companies to connect same; the said connecting wires in latter instance to be the property of Harrison Brothers & Co.

At the expiration of ten years the said private wires of Harrison Brothers & Co. to revert to the said companies, after which time Harrison Brothers & Co. have the right to continue the use of said wire with their co-operators, with all of the privileges thereunto accruing, for the yearly rental of six hundred dollars, payable quarterly.

Neither Harrison Brothers & Co. nor those interested through them to be required by said companies to do public business.

In case of a violation of this contract by the parties of the second
35 *part or their licensees they shall pay to the parties of the first part four times the current rates for similar messages and the expenses of reconveying the same as liquidation damages.*

Neither Harrison Bros. & Co. nor those interested through them allowed by the companies to do public business for their own account or benefit. Should they be willing to transmit any such messages, they to charge the companies' regular tolls and hand same weekly over to the proper officers of said companies without discount or diminution.

When during the three months the wire [allotted to] *put up by* Harrison Brothers & Co. and their two co-operators shall fail to work, then business shall be sent to the main offices and be transmitted free in turn with other business messages at said offices; also the same when their own wire may fail to work.

Harrison Brothers & Co. and those interested through them are not to do other than their own legitimate mercantile and personal business either over their own wire or that leased from the companies.

Any [palpable] *intention* violation of this provision shall be represented to Harrison Bros. & Co., and upon repetition by them shall make this contract, so far as they are individually concerned, null and void. In case complaint is made to Harrison Bros. & Co. that any parties interested with them are violating any of the articles of this agreement they shall notify said parties, and if the violation is then continued they, the parties violating, shall cease to be allowed to transact their business under this agreement, *and if this should continue and be found by arbitration to have been so intentionally persisted in it shall terminate this contract.*

It is agreed by the Franklin and Insulated Lines Telegraph Company that no debts at present made or hereafter contracted shall in
any way injure the rights of Harrison Bros. & Co. under this
36 agreement or impair their title to the wire put up by them on the poles of said companies.

In consideration of the foregoing Harrison Brothers & Co. agree to give up the contract that they now hold from the Insulated Lines Telegraph Company.

In witness whereto the above agreement is informally signed for ratification by the said companies and the said firm, Harrison Brothers & Co.

CHAS. H. BURD,
For Franklin and Insulated Lines Tel. Co.
THOS. S. HARRISON,
For Harrison Bros. & Co.

NOTE.—Words added are in italics. Words stricken out are bracketed.

37 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

This is to certify that Charles H. Burd, the above-named deponent, appeared before me at twelve o'clock m. on the twelfth day of July, A. D. 1883, at the "Parker house," in Boston, Commonwealth of Massachusetts, and gave the foregoing deposition to be used in an action in equity now pending between John Harrison *et al.*, complainants, and The Franklin Telegraph Company *et al.*, defendants, before the United States circuit court for the eastern district of Pennsylvania; that prior to his examination the said deponent was duly sworn by me to testify the truth, the whole truth, and nothing but the truth relating to the cause for which said deposition is taken; that both parties to the said action had an opportunity to examine the said deponent as in the statute provided; that the said deposition was reduced to writing by me; that it was carefully read to the said deponent by me and was then subscribed by him in my presence; that the said deposition was taken at the request of the complainants in said action, the said deponent living at a greater distance from the place of trial than one hundred miles; that the defendants in said action attended at the taking of said deposition by their attorney, R. M. Schick, Esq., and that it was agreed that this deposition might be left open and off the files of the court for the use of either party.

Boston, this thirteenth day of July, A. D. 1883.

WM. SIGOURNEY OTIS,
Notary Public.

[NOTARIAL SEAL.]

38 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania. In Equity.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Bros. & Co.,
vs.
THE FRANKLIN TELEGRAPH COMPANY, THE Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.

No. 26. October Sessions, 1882.

Now, March 5th, 1885, the complainants, by their attorney, enter a rule for a commission to be issued to M. C. Jordan, Esq., of the city of Jacksonville, in the State of Florida, to take the testimony of a witness in the annexed interrogatories to be read in evidence in the hearing of the above-entitled causes.

39 Interrogatories to be exhibited to and answered by *by* James Wentworth Brown, a witness to be produced, sworn or affirmed, and examined on the part of the complainants by the above-named commissioner.

First interrogatory. What is your name and occupation and residence?

Second interrogatory. Do you remember that a contract was made between the Franklin Telegraph Company, for their own account and on behalf of the Insulated Lines Telegraph Company, and Harrison Bros. & Co.; and, if so, when was it made?

Third interrogatory. What was your occupation at this time, and how did you come to know anything about this contract?

Fourth interrogatory. Were you present at any interview when the terms of the contract were discussed or settled; if so, when, where, who were present, and what was said?

Fifth interrogatory. State, if you remember, what price was to be paid for the use of a wire by Harrison Bros. & Co., if any, and for how long they were to have the right to use a wire.

Sixth interrogatory. Do you know any other matter or thing touching the matters for which this suit is brought that may tend to the benefit or advantage of said plaintiffs? If yes, declare the same fully and at large as if you had been particularly interrogated thereto.

S. S. HOLLINGSWORTH,
For Complainants.

40 In the Circuit — of the United States in and for the Eastern District of Pennsylvania, in the Third District.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas S. Harrison, Trading as Harrison Bros. & Co.,
vs.
THE FRANKLIN TELEGRAPH COMPANY, THE Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.
} Of October Sessions, 1882. No. 26.

JAMES WENTWORTH BROWN, a witness called on behalf of the complainant herein to testify before M. C. Jordan, Esq., at Jacksonville, Florida, by virtue of a commission issued out of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, under the seal of said court, being duly cautioned and sworn to tell the whole truth and being carefully examined, deposes and says as follows:

For answer to the first interrogatory the witness says:

My name is James Wentworth Brown; my occupation is merchant; my residence is Needham, Massachusetts.

For answer to the second interrogatory the witness says:

I do; about the year 1867.

41 For answer to the third interrogatory the witness says:

My occupation at that time was a merchant, and I came to know about this contract by reason of being one of the principal owners or stockholders in The Franklin Telegraph Company, one of the defendants. I am quite positive I was at that time the treasurer of the Franklin Telegraph Company and I think I was one of the directors of the company.

For answer to the fourth interrogatory the witness says:

I was present at an interview when the terms of the contract were discussed. It was a matter of a great deal of importance to the Franklin Telegraph Company. It was discussed a great deal before we agreed to it. It was discussed between Mr. Stearns, the president of the company, and myself and the officers of the company a good deal. This was at Boston, Massachusetts, about the time when the contract was about to be completed. The matter was discussed in a general way in the interests of the Franklin Telegraph Company. The question under discussion was whether the company would make the contract or not.

For answer to the fifth interrogatory the witness says:

The terms of the contract or agreement with Harrison Bros. & Co. were to pay the telegraph company for the use of the wire after the expiration of the first ten years $600 per annum. The contract was to continue or terminate at the option of Harrison Bros. & Co.—that is, they had the right to abrogate the contract at any time they desired to do so. This right was only in them. They were to have the use of the wire as long as they wanted it.

42 For answer to the sixth interrogatory the witness says:

At the time this contract was made Mr. Charles H. Burd was the general agent of the company and had charge of the negotiations and arrangements of the contract.

JAMES WENTWORTH BROWN.

Subscribed and sworn before me eleventh day of March, A. D. 1885.

M. C. JORDAN,
Commissioner.

[SEAL.]

I hereby certify that on Wednesday, the eleventh day of March, A. D. 1885, before me, M. C. Jordan, a notary public in and for the State of Florida at large and commissioner appointed in the annexed commission, at my office, No. 18½ Bay street, in the city of Jacksonville, county of Duval and State of Florida, personally appeared before me James Wentworth Brown, and the said James Wentworth Brown, a witness for the complainants in the above-entitled cause, being by me first duly cautioned and sworn to testify the whole truth and being carefully examined, deposed and said as appears by the deposition hereto annexed.

And I further certify that the said deposition was then and there reduced to writing of the character known as typewriting, and was, after it had been reduced to such writing, read over by the said James Wentworth Brown and subscribed to by him.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

43 And I further certify that the fee for taking said deposition is five dollars, being the fee allowed by the laws of this the State of Florida.

In testimony whereof I have hereunto set my hand as the commissioner appointed in the annexed commission, in the city of Jacksonville and State of Florida, this eleventh day of March, A. D. 1885.

[SEAL.] M. C. JORDAN,
Commissioner.

In United States Circuit Court, Eastern District of Pennsylvania.

JOHN HARRISON *et al.* *vs.* THE FRANKLIN TELEGRAPH COMPANY *et al.* } In Equity. October Sessions, 1882. No. 26.

Depositions on behalf of complainants, taken, sworn, and subscribed to before Charles F. Ziegler, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia, at the office of Messrs. Hollingsworth & Fraley, No. 714 Walnut street, Philadelphia, on Friday, December 3d, 1886, and pursuant to adjournment, it being agreed that said Charles F. Ziegler act as special examiner the same as though he had been specially appointed by the court.

Present: S. S. Hollingsworth, Esq., counsel for complainants; Rudolph M. Shick, Esq., counsel for defendants.

44 THOMAS S. HARRISON, one of the complainants, being duly sworn according to law, deposes and says as follows in response to interrogatories proposed by Mr. HOLLINGSWORTH:

1 Q. What is your name, age, residence, and occupation?

A. Thomas S. Harrison; 49; Philadelphia; manufacturing chemist.

2 Q. Are you one of the plaintiffs in this suit?

A. I am.

3 Q. Did you negotiate the contract, dated May 1st, 1867, between the Franklin Telegraph Company and Harrison Bros. & Co., referred to in the bill?

A. I did.

4 Q. State, in your way, the circumstances under which that contract came to be made. I mean to refer by these questions (to) your relations with the Insulated Lines Telegraph Company, and how your contract above referred to came to be made.

A. I think it was in the spring of 1867 that a Mr. Burd, who stated that he was connected with the Franklin Telegraph Company, called upon my firm, Harrison Bros. & Co., at their Front-street office. He said that the object of his visit was to learn something in relation

to a contract between said firm and the Insulated Lines Telegraph Company. After considerable conversation I found that there was to be a consolidation of the Insulated Lines and Franklin Companies, and that the contract above referred to was an impediment. At that or more likely at subsequent interviews (for we had several) negotiations were begun by which the said contract was to be given up and Harrison Bros. & Co. given the advantage of direct telegraphic communication between their offices in Philadelphia and New York. The correspondence between them and the Franklin Company
45 was carried on through Mr. Burd, and I think more than one draft of a contract was submitted—as an objection would be made the points would be met by changes so far as were mutually satisfactory—until at last a contract was agreed upon that had but one provision of any importance, which required Harrison Bros. & Co. and the Franklin Company to come together (upon) for a complete understanding. The result was that Mr. Stearns, the president of the company, and Mr. Brown, its treasurer, visited Philadelphia and called upon my firm at its Front-street office. My recollection of that interview is very clear, even so far as to carry me back to the positions occupied by the gentlemen while sitting in the office during the interview and a portion of the wording of that interview.

(Mr. Schick objects to witness testifying to any of the conversation or details of the negotiations which led up to formation of the contract of May 21st, 1867, as immaterial and irrelevant and as all such negotiations were merged in the written contract.)

It had been agreed that Harrison Bros. & Co. were to build a line or swing a wire upon the poles of the Franklin Company between Philadelphia and New York at their own expense, the consideration of which I will speak of later on; but it was desired by the Franklin Company that at the expiration of ten years the title to the wire was to revert to said company, and during this period no charge was to be made for repairs or maintenance, after ten years a charge of $600 per annum to be made. The interview was to explain the meaning of the company's desire for a title, and its result was a thorough understanding between it and Harrison Bros. & Co. as to that portion of the contract. Mr. Stearns, the president of the company,
stated that it was not intended in any respect to lessen Harrison
46 Bros. & Co.'s rights, but that he did not consider it in accordance with the dignity, or something of that kind, of that company that a private wire should be known to be upon, or to be upon, its poles; that Harrison Bros. & Co. should continue to have the same use as if the title was in their name, and be in every respect the same as if the wire had not reverted to his company. In other words, I gathered that his objection was more sentimental. I replied, and I remember these words distinctly: "Very well, Mr. Stearns; if you let us retain the substance I have no objection that you have the shadow." The reason that we were to have the repairs and maintenance at expense of company for ten years, in addition to giving

up the insulated lines contract, was, as I understood, because of a subscription to four hundred and fifty shares of the stock of the Franklin Company at twenty dollars per share. We had previously induced a subscription of fifty shares at twenty dollars. Although, so far as we could learn, there was no market quotation for the stock, the payment of money to the Franklin Company, through the efforts of Harrison Bros. & Co., amounted to $10,000.

It was agreed between us that after ten years the wire was likely to have lost its identity in repairs and renewals that had taken place, and that it would be fair that we should pay, per annum, a sum equal to the estimated cost of maintenance. These sums of $600 per annum were agreed upon as suitable.

5 Q. Was there, at any interview between you [and] Messrs. Stearns and Brown, any conversation relating to the duration of your use of the wire? If so, state this conversation—what you said and what they said.

(Objected to as before.)

47 A. There was, at the interview above referred, to a conversation relating to that matter. Mr. Stearns said distinctly that there was no intent to limit the time of the continued use by Harrison Bros. & Co. of the wire; that it was altogether a matter of Harrison Bros. & Co.'s option; either he or Mr. Brown expressed some doubt as to whether Harrison Bros. & Co. would find sufficient paying business in a private wire to warrant the expenses of its continued use; but it was stated by one or the other, or both, that that would be a matter for Harrison Bros. & Co. to determine. In other words, if I may be permitted to concentrate the matter of their conversation——

(Mr. Schick objects.)

—it was that the telegraphic communication between Philadelphia and New York, controlled by Harrison Bros. & Co., was to be continuous, at their option, so long as they might desire.

6 Q. At the time that this contract was made, what was the condition of the wires of the Insulated [Lines] Company?

A. I don't know.

7 Q. Was the desirability or the necessity of the construction of a line between Philadelphia and New York discussed between you and the Franklin Company?

A. Only so far as the desire of a more thoroughly insulated wire, between Mr. Burd and myself. He stated his companies desired to have a wire insulated by the Brooks patent insulator, and Harrison Bros. & Co. agreed to use it, although the cost per insulator on the Brooks patent was forty-two cents, against thirteen cents for the ordinary glass insulator.

8 Q. Was there any advantage in a wire insulated by the Brooks patent?

A. It was undoubtedly thought it was a great advantage, as by the Brooks insulator a wire could be worked over long distances in rain-storms and all kinds of weather.

48 9 Q. Was anything said by the Franklin Company before this contract was signed in regard to their need for money?

(Objected to as immaterial and as before.)

A. Mr. Burd stated before the ratification of the contract by the board of directors, but after its points had been agreed upon, that the company was in need of money, and it was because of its need that the consolidation had been made, and he desired subscriptions to its stock. He generally stated the bad condition of the insulated lines and the requirements of large sums to put the wires in good order.

10 Q. How much did the wire that you put up cost?

(Objected to as immaterial.)

A. About $11,563.88. These figures I get from receipted bills for material and work furnished and done. We always considered that, in addition to that sum, we could add the $9,000 paid by us for the stock, which we were obliged to carry many years, a large proportion of it not being sold for eight or nine years, and no dividends were ever paid to us on it, if I remember correctly. This sum of $11,562.88 was made up as follows:

Cable across North river, to Bishop Gutta Percha Company	$3,220 03
J. Smith, for stringing wire and right of way in Philadelphia and New York over house tops, &c.	800 00
Joint expense to Kensington, to which Harrison Bros. & Co. already had a wire	29 95
My expenses during the negotiations, principally in New York	268 16
M'Clees, Lefferts & Co., for wire	4,185 87
W. R. Alison, for Brooks insulators	2,282 80
E. Middleton, for stringing wire from Jersey City to Kensington	777 07

49 It is proper to state that the cable across North river contained three wires, and two of these, some years afterwards, were paid for by the Franklin Company. The price received was somewhere between $1,500 and $2,000, I think; but as an offset to this we were obliged to pay, for use of a patent upon which the cable had been constructed, $1,000.

Cross-examined.

By Mr. SCHICK:

11 X Q. Do you remember the date of this interview between yourself and Messrs. Stearns and Brown at your office?

A. Not with exactness, except that it was some time prior to September, 1867. Whether it was before the date as written on the contract or after I can't say. It was before the contract was executed.

12 X Q. Do you know how long before?

A. No; I couldn't state.

13 X Q. Was not the contract made at the time it bears date?

A. I know the contract was made before the written instrument was made. It was then written and passed as a contract at that time.

14 X Q. Then why do you fix the date of this interview between you and Messrs. Stearns and Brown as prior to September instead of May?

A. Only because of the great lapse of time between this and when the transaction took place, and because, without the date written upon the contract, I could not, from my own recollection, state other than that I know it was before the fall season began.

15 X Q. Do you think it was near the opening of the fall season?

A. No; but I know that the wire was erected during
50 the summer of 1867, and of course the contract must have been passed before any money was expended.

16 X Q. Did this conversation take place before or after the erection of the wire?

A. Before.

17 X Q. Are you quite sure it was before the contract was signed?

A. I am quite sure it was before the contract was ratified and considered a binding contract on both parties.

18 X Q. Was there any ratification of the contract beside its ratification by signing?

A. It was signed by Harrison Bros. & Co. at Philadelphia. It was either taken to Boston by Mr. Burd or mailed directly by Harrison Bros. & Co. It was then, in the course of time, returned signed by the Franklin Company; that is my recollection of it at the present time.

19 X Q. Do you know when you received it from the Franklin Company signed?

A. No; I do not. Putting my mind back to the matter, I am inclined to think that the contract was sent on to the Franklin Company without the signature of Harrison Bros. & Co., as I have stated, and it was somewhat changed by the Franklin people, who returned it through Mr. Burd, in the handwriting of one of their clerks, and a copy was made by Harrison Bros. & Co. and that copy signed and sent to Boston, Harrison Bros. & Co. retaining the copy the Franklin Company had executed and mailed to Philadelphia. I now have in my mind an incident which induces me positively to state that the conversation between Stearns, Brown, and myself in Philadelphia to which I have referred in my testimony took place prior to the execution of the contract because of the insertion in the contract of some wording respecting arbitration which Mr. Brown
51 left with me upon a scrap of paper. That was at the time of the conversation. We put what he left with me into the contract.

(Corrected draft of contract with the slip referred to in Mr. Brown's handwriting, both marked "Exhibit X," produced.)

20 X Q. Who executed the contract on behalf of your firm?

A. I think by all the members of our firm.

21 X Q. The contract as executed was submitted to you by counsel and approved by them before you executed same?

A. Yes; R. C. McMurtrie, Esquire, was our counsel at the time.

22 X Q. Was your interview with Stearns and Brown early or late in the negotiations?

A. Shortly before paper was signed.

23 X Q. The contract was not signed at the time it bears date, you are certain?

A. I think so. It was signed before we began to put up wire.

24 X Q. Was this conversation prior to Mr. McMurtrie's examination of that paper?

A. Yes, sir; Mr. McMurtrie made some change in the wording to make the matter, as he said, conclusive concerning our continued use of the wire after ten years; therefore I must have communicated to him the result of the interview and after we had agreed upon the contract.

(Exhibit A, W. S. O., to testimony of Chas. S. Burd shown witness.)

25 X Q. Was this conversation with Messrs. Stearns and Brown prior to the preparation of that paper?

A. I don't think it was. I think the conversation was after this. I can't say positively. It is so long ago.

52 26 X Q. What points were in dispute between you and Messrs. Brown and Stearns during this conversation?

A. The principal matter was the meaning of the clause respecting the use of the wire after ten years.

27 X Q. Were you not satisfied with the advice of your counsel on that subject?

A. I believe Mr. McMurtrie wanted that matter clearly defined or thoroughly understood.

28 X Q. And the contract as suggested by him did embody your agreement made in that conference?

A. Mr. McMurtrie was satisfied that the continuance of our use was beyond doubt, and we never thought it could be a question until we received a notice from the Atlantic and Pacific Company of its desire to terminate the contract.

29 X Q. repeated.

(Objected to, as witness cannot interpret the legal meaning, &c.)

A. I cannot answer that question intelligently, excepting, if you mean did Mr. McMurtrie believe that under the contract Harrison Brothers & Co. had the option of the use of the wire, year by year, after the expiration of ten years, I can say Mr. McMurtrie was satisfied the contract gave that right.

THOMAS S. HARRISON.

Sworn and subscribed to before me this third day of December, 1886.

CHARLES F. ZIEGLER,

[SEAL.] *Notary Public.*

53 EXHIBIT X.

[NOTE.—Words added are in *italics;* words stricken out are bracketed.]

Memorandum of agreement made this May 17, 1867, by the Franklin Telegraph Co., for their own account and on behalf of the Insulated Lines Telegraph Co., [on] *of* the one part, and Harrison Brothers & Co., manufacturing chemists, Philadelphia, on the other part, witnesseth: That the party of the first part, for and in consideration of *the relinquishment by H. B. & Co. to the Franklin Telegraph — of* a valuable contract made [with them by] *by the party of the 2nd part with* the Insulated Lines Tel. Co. [which is hereby relinquished to the Franklin Tel. Co.], *hereby* grants, bargains, and sells to the party of the 2nd part the right to put or have put up, *maintain, & use* a telegraphic wire between the cities of New York and Philadelphia upon [their or] the poles of the *Franklin Tel. Co. or of the* Insulated Lines Tel. Co. *or of those persons or corporations* whose property has lately been purchased by or consolidated into the stock of the party of the 1st part; and the party of the 2nd part is privileged, at their option, to allow four other parties to use the same with them [having in all cases on their own wire], they and the[ir co-operators] *licensees as aforesaid,* the priority, in the use of the same *for transmission of messages* free of all expense [to them or their co-operators]; *the party of the 1st part to have the use of the same when not so employed;* and in consideration of allowing the use of said wire to the party of the first part when they, the said H. B. & Co. and [their co-operators] *their licensees as aforesaid,* are not using the same the party of the first part agrees to keep the said wire in good working order *to and* between the offices of the party of the 2nd part and [their co-operators] *such four other persons* in the cities of New York and Philadelphia; all expenses of batteries, &c., con-
54 nected with the working of said wire to be paid by the parties of the 1st part. At the expiration of ten years the party of the 2nd part agrees that their private wire shall belong to the party of the 1st part [who], after which time *the party of the first part agrees to* lease the same to the party of the 2nd part *for the use of themselves* and *of such other four persons as H. B. & Co. shall suffer and permit to use the same* [their co-operators] for the sum of six hundred dollars per annum, payable quarterly, and [both parties continue bound by the obligations of this contract the same] *upon the same terms in all other respects* as if the wire had not been given up *to the party of the 1st part.*

The party of the second part, however, agrees that [they shall have no right to transfer the right to lease] *no assignment by the parties of the 2nd part of their right under this contract shall give their assignees the right to demand a lease of* the said wire after the expiration of the ten years, *which right is to be a personal privilege of H. B. & Co. or that firm for the time being* [to any one whatsoever] [and during the ten years only to such party as will be acceptable to the Franklin Tel. Co. who agrees that no objection on their part shall

be considered valid unless they can fairly show that the transfer is made to a party to whom it would manifestly be more to their disadvantage to allow the right than the party of the 2nd part].

"N. B.—These two paragraphs are written upon a separate slip of paper."

It is further agreed that the right of giving the use of the wire to four other parties shall be exercised by H. B. & Co. or their assignees only by giving the same to any mercantile house not being a corporation, or banker, or stock or exchange broker.

In case of any disagreement on that or any other point embraced in this contract, the decision of the same shall be left to two disinterested persons mutually chosen by the parties hereto, with the right to call in a third as umpire, whose decision shall be final.

55 *In case these objections are valid the party of the 1st part reserves the right to purchase the said wire at a fair valuation, to be determined by referees in the same manner as any other matter in this agreement.* With the above exception the party of the 2nd part has the right of transfer.

No change in the firm of the party of the 2nd part or those interested thro' them, by death or retirement of any member *or by addition to members of said firm or* from other cause, [to] *shall* vitiate the title of the party of the 2nd part or [to] destroy its continuance in full force.

56 (Endorsed:) No. 26. October sessions, 1882. United States circuit court, eastern district of Pennsylvania. In equity. John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., *vs.* The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company. Complainants' evidence.

57 In the United States Circuit Court for the Eastern District of Pennsylvania. In Equity.

JOHN HARRISON, GEORGE L. HARRISON, Jr., and Thomas S. Harrison, Jr., Trading as Harrison Brothers & Company,	
vs.	October Sessions, 1882.
THE FRANKLIN TELEGRAPH COMPANY, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.	No. 26.

Mr. S. S. Hollingsworth, counsel for the plaintiffs; R. M. Schick and B. H. Brewster, counsel for the defendants.

Depositions on Behalf of the Defendants.

JAMES G. SMITH sworn.

Direct examination.

By Mr. SCHICK:

Q. Where do you reside?

A. New York city.

Q. What is your business?

A. I am engaged in manufacturing at present.

58 Q. Were you at any time connected with the Franklin Telegraph Company?

A. I was.

Q. When?

A. From the year 1867 until about 1875.

Q. In what capacity?

A. As general superintendent.

Q. Are you familiar with the cost of maintaining wires between New York and Philadelphia during that time?

A. Yes; I think I am.

Q. What is the length of the line of the Franklin Telegraph Company between New York and Philadelphia?

A. About one hundred and twenty miles.

Q. What was the cost per mile of wire for maintenance?

A. What do you include in that?

Q. By maintenance I mean the cost of repairs and the cost of batteries and the repairs to the cable.

A. Somewhere about thirteen or fourteen dollars per mile for each wire.

Q. Including the whole of the wires of the Franklin Company?

A. Yes, sir.

Q. What are the items of that cost? How do you arrive at them? What were the expenses you were put to?

A. Well, let us see. The cost of repairers, linemen, and cablemen regularly stationed between New York and Philadelphia was about $500 per month. The cost of their ordinary expenses was $120 per month on the average.

Q. You mean the expenses of these linemen?

A. Yes, sir; their expenses in going out for repairs, including the teams, and so on, that they took. The rents for repair stations amount to about sixty dollars per month between New York and Philadelphia—that is, not including any rent in New York or Philadelphia. The cost of batteries would be about thirty-three dollars per month. The material for repairs will cost, on an average, twenty-five dollars per month, including storms, &c. Repairs to cable would average fifty dollars per month. That would

59 aggregate about $9,336 per year. Divided among five wires (there were five wires on the poles), it would be $1,867 for each wire per year. As the line was one hundred and twenty miles in length, that would make it $15.56 per mile per wire.

Q. As superintendent of the Franklin Telegraph Company you had control of the Harrison wire?

A. Yes, sir.

Q. You remember such a wire, do you?

A. I do.

Q. What is the average life of a wire along such a route as this of the Franklin Telegraph Company?

A. Well, I should say, in my judgment, perhaps fifteen years. It

depends a great deal upon the circumstances in which the wire is placed.

Cross-examined.

By Mr. HOLLINGSWORTH:

Q. Were you the superintendent of the Franklin Telegraph Company at the time that the contract was made with the defendants?

A. I was.

Q. How many wires had the Franklin Company before this contract was made?

A. Four.

Q. Give me the cost of the maintenance of the four wires of the Franklin Telegraph Company before this wire was acquired in the same way as you have given the cost of the five wires. What was the cost of your linemen on the four wires?

A. The cost for linemen would be the same for four wires as for five.

Q. Well, what would that be—$500?

A. Pretty nearly, if not fully as much as, $500, because the maintenance of the one wire added to the four would scarcely be sufficient to make it necessary to employ an additional lineman, especially at stations between two large cities.

Q. Now, for the next item. Will you give me the expenses of the linemen?

60 A. The expenses would be, I should say, about three-quarters.

Q. That is, ninety dollars per month?

A. I would say ninety dollars per month.

Q. Now, will you tell me why the addition of one wire involves an expense in sending out the same number of linemen of thirty-three and one-third per cent. to what it would cost to send out the men where there were four wires?

A. The additional wire on the poles makes it more liable to interruption, adds to the weight on the poles, and, especially during sleet storms, adds to the liability of breaking down not only the wires but also the poles.

Q. Then I understand you that the expense of a given number of linemen for five wires being $120 per month, that for four would be ninety dollars. What would it be for three wires?

A. I should say it would be seventy-five dollars.

Q. What are the items under the head of expenses for linemen?

A. In the first place, ordinary city car fare where it is in the city; the hiring of teams to go out on the road; meals while out engaged in repairs, and such assistance as they may find it necessary to hire in sudden cases of trouble.

Q. Well, with the same number of men on the same number of trips the items of expense would be the same?

A. No; it depends entirely upon the circumstances of the trip. They would have to go twice as far in one case as in another. There would be more damage to repair at one time than another,

requiring them to spend more time, necessitating more meals, and sometimes lodging, according as the circumstances varied.

Q. How do you fix $120 as the monthly expenses?

A. They will average about that. That was the average in the Franklin Company, as I recollect it.

Q. With the same number of men making the same number of trips under about the same circumstances, would not the expenses be the same?

A. They might be about the same.

61 Q. If $120 per month is a fair estimate of the expenses, that would always be the amount?

A. It might be $140 or it might be ninety dollars; the average would be about $120.

Q. When you give $120 per month as an estimate of the expenses of the linemen, do you mean to say that it was about that?

A. It would average that.

Q. With the number of linemen that you employed to go out and under the circumstances in which they had to go out, they would average about $120 per month?

A. Yes, sir.

Q. How do you account for the fact that when you take one wire off the line you reduce this average expense thirty dollars per month?

A. Because the average amount of damage would be less and the average number of trips would be less, judging by my experience with them.

Q. What is the cause of the reduction?

A. I have already told you that.

Q. Well, give it again.

A. There are two or three reasons. Because the additional wire is likely to break, causing an additional number of trips. The additional weight of the wires on the poles is likely to cause additional trouble in case of snow or sleet being on the wire. The fifth may add enough to break the pole down, making it necessary to go to additional expense for repairs, perhaps, for a new pole; also expense for team and for assistance, from which I would judge that the fifth wire would be the cause of the difference.

Q. Why is it that if the expenses of the linemen for three wires are seventy-five dollars per month that the addition of one wire, making four, would only add fifteen dollars per month, whereas an addition of a fifth wire to the four wires adds thirty dollars per month?

A. I think the proportion would increase as you go up in the number of wires.

Q. Do you speak from actual knowledge of what took place on the Franklin?

62 A. I am speaking in reference to my experience with telegraph lines. I am giving you my estimate according to my judgment. I never managed lines with three wires.

Q. Have you ever managed with four wires?

A. Yes, sir; a short time.

Q. What would be the expense for materials with four wires, the expenses of five wires having been given as twenty-five dollars?

A. Well, it might be in the neighborhood of twenty dollars.

Q. Was not the additional wire you got from Harrison's in a great deal better condition than the four wires you had between New York and Philadelphia?

A. For a short time.

Q. When you first got it?

A. I think it was about the same.

Q. The insulators were better, were they not?

A. I think they were not as good. They were supposed to be and they probably cost more.

Q. Was the wire in as good condition as your wires? Was it as effective a wire to transmit messages over?

A. Just about. The difference would not be sufficient for us to notice positively.

Q. You are speaking from actual recollection?

A. Yes, sir.

Q. What would be the additional expense for cable repairs between four wires and five wires?

A. I do not think I can estimate that. I never knew a four-wire cable.

Q. Would it be materially greater for five than four?

A. You would have to find the additional cable. It would be the same.

Q. On what do you base your opinion that the life of a wire is fifteen years?

A. Merely a question of judgment.

Q. You do not mean to state from actual experience that this is the life of these wires?

A. No; I have known wires to give out in twelve years.

Q. What do you mean by wires giving out in twelve years?

63 A. It has been repaired or used up to such an extent by its breakage and by its reduction in size by the action of the atmosphere in some locations where it is subject to acid influences as to thereby destroy it.

Q. Do you not maintain a wire by substituting for one portion a new wire when you find that portion has become worn out, and then for another portion you substitute another new wire?

A. This is very apt to be the way.

Q. You do not renew a wire all the way between New York and Philadelphia, do you?

A. I have known a wire to be worn out in so many places and in such lengths that it was more economical to put up a new wire than to repair the old one.

Redirect examination.

By Mr. SCHICK:

Q. Did Harrisons make an entirely new cable for their line?

A. They did.

Q. That gave you the expense of attending to that cable, did it not?
A. It did.
Q. Were your expenses increased by the addition of that cable?
A. They were.
Q. Probably to what extent?
A. The additional expenses on account of that cable were fully thirty-three and one-third per cent.

Recross-examination.

By Mr. HOLLINGSWORTH:

Q. What expenses were increased thirty-three and one-third per cent.?
A. The expenses of maintaining the cable and repairs to it.
Q. That was the second cable? You already had a cable
64 put down before that, and the total cable expenses for the two cables were fifty dollars per month?
A. I think it would average about fifty dollars per month.
Q. How many wires had the Harrison cable in it?
A. Two.
Q. Two exclusively used by yourselves?
A. Yes, sir.
Q. Were these figures you give us simply estimates? You do not speak of them as the actual expenses incurred, do you?
A. They were that, at least.
Q. You are quite sure that the actual expenses were as high as mentioned?
A. They were, except when I have given estimates based on my judgment, as in regard to the three wires and the four wires.
Q. What manufacturing business are you in?
A. Alarm clocks and automatic sprinklers.
Q. Are you connected with the telegraph company, the defendant, in any way?
A. No; in no way whatever.

Sworn to before me this twenty-fifth day of March, A. D. 1887, by James G. Smith.

JOSHUA R. MORGAN,
[SEAL.] *Notary Public.*

JOHN VAN HORNE sworn on behalf of defendants:

Q. What is your full name?
A. John Van Horne.
Q. You are vice-president of the Western Union Telegraph Company?
A. Yes, sir.
Q. Do your duties as such make you acquainted with the price for leasing wires and the rental for maintenance of wires on poles, and all matters of that kind?

A. Yes. I have charge of contracts, and the leases for leased wires are drawn up in my office.

65 Q. What does your company charge for the privilege of stringing wires on your poles?

A. Four dollars per annum per mile.

Q. Does that include any cost of maintenance of the wire or the furnishing of battery?

A. No, sir; it covers only the privilege of putting the wires on our poles.

Q. That is your present price for that privilege?

A. Yes, sir.

Q. Do you know whether the present price for that is less or greater than it was in 1867 and between that and 1877?

A. I think it is the same. I would say that that privilege is granted only to a very limited extent and only to parties with whom we have contracts, working arrangements, like railroad companies. We charge telephone companies a higher price than that.

Q. You have no such contracts with private firms or individuals?

A. No, sir.

Q. Does your company at present lease exclusive use of wires?

A. Yes, sir; we lease a great many wires.

Q. What is the present rental of a wire between Philadelphia and New York?

A. $2,400 per annum.

Q. Do you know what it was in 1877?

A. The first wire we leased (I do not know whether it was as early as 1877) was $4,200 per annum between Philadelphia and New York.

Q. Has the price been maintained at that ever since?

A. The price was reduced from $4,200 to $3,600 and then to $2,400. I think that was the next reduction.

Q. What are the privileges of lessees under such leases as to their privilege to use the wire?

A. They have the right to use the wire on their own business only, generally between certain hours which are designated in the agreement, generally from nine o'clock a. m. until four or five o'clock p. m.

66 Q. Who shall have the use of it during the rest of the time?

A. The telegraph company.

Q. Do they also have the privilege of quadruplexing this wire?

A. The telegraph company reserves the privilege of quadruplexing the wire.

Q. Can they then use it themselves?

A. Yes, sir; or lease it to other parties.

Q. Do these lessees which you mention have the right to appoint licensees who shall enjoy the same privileges under them?

A. They sometimes ask for the privilege of making additional connections with other firms either in Philadelphia or New York.

Q. Under what terms are such privileges granted?

A. Such additional connections are made at an additional charge of $500 per annum.

Q. Are you familiar with the privileges that Harrison & Brothers had under their contract?

A. Yes, sir; I am somewhat.

Q. They had the privilege of using it themselves and appointing four licensees?

A. Yes, sir; eight additional connections, four in each city—four licensees with connections in each city.

Q. The contract between Harrison Brothers and the telegraph company provides that Harrison Brothers "are privileged, at their option, to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of said wire for the transmission of their messages free of all expenses." What would be the present value of such facilities?

A. If each had a connection in New York as well as Philadelphia the value would be $6,400 per annum. If they had connections in Philadelphia only—that is, if they had only four connections—the value would be, according to the rentals now charged, $4,400.

Q. What would the value have been in 1881 and 1882?

67 A. It would have been $11,600, with eight connections—four in each city—always besides Mr. Harrison's connections, and with four connections it would have been $7,600.

Q. What was the value of these facilities in 1877 and 1878?

A. The rental was a little more, but we leased very few wires previous to 1880. The privilege of making additional connections on the leased wires at the additional rental of $500 per annum does not carry with it the right to do any business except with the lessee of the wire; it does not carry with it the right to do business with any other firms.

Q. What are the duties of the telegraph company as to such leased wires with respect to their maintenance and battery?

A. The telegraph company maintains them and furnishes battery—furnishes everything except operators. When the telegraph company furnishes operators it is at the expense of the lessee.

Cross-examination.

By Mr. HOLLINGSWORTH:

Q. Where you exercise the privilege of quadruplexing the wire that does not interfere with the privilege of the lessee to use the wire as fully as he could have done before such privilege was exercised?

A. No, sir.

Q. These figures you have given of the cost of leased lines and additions thereto are the prices of the Western Union Telegraph Company, are they not?

A. Yes, sir.

Q. Are there no rival lines that have lower prices?

A. Yes, sir.

Q. Is there any great difference between your prices and those of other lines?

A. I think there is $200; of course we cannot state positively.

Sworn to by the above-named John Van Horne before me the twenty-fifth day of March, A. D. 1887.

JOSHUA R. MORGAN,
[SEAL.] *Notary Public.*

68 Deposition of Frank R. Webb, a witness produced, sworn, and examined on behalf of defendants, before me, Joshua R. Morgan, a notary public, at the office of R. M. Schick, Esq., No. 131 South Seventh street, in the city of Philadelphia, on the eleventh day of August, A. D. 1887, between the hours of three and five o'clock p. m.

Present: S. S. Hollingsworth, Esq., for plaintiffs, and R. M. Schick, Esq., for defendants.

FRANK R. WEBB, a witness produced by the defendants, being duly sworn and examined, deposes and says: I was telegraph operator in 1879 for the Franklin Telegraph Company at the northeast corner of Third and Chestnut streets. That was the main office of the company in this city. Wires from the office of that company run direct to New York city. The Franklin Company had no wires running to New York city that I know of, except such as run from that office. Our company had at that time between the two cities (9) wires. I remember that the wire of Harrison Bros. & Co. was a very bad wire—very hard to work, especially in rainy weather. That wire was known as No. 5, or, as we called —, Harrison & Bros.' wire. The wire was given to Harrison Bros. each morning—that is, the loops that run to Harrisons' office were connected to No. 5 each morning. Then Harrison Bros. telegraphed direct. When their wire was interrupted we took their messages and sent them over the main wire of the company. When we could we used the Harrison wire for the company's own business, but the wire was so bad that we could not use it in rainy weather. My recollection of Harrison Bros.' wire is that it was taken down and rebuilt. The whole line was taken down, and this one was taken down along with the rest of the wires. New poles were put in—that is, when the poles were weak or decayed or something of that sort. My recollection is that after the reconstruction for a time we did business for them at the main office. They sent their telegrams to the main office and we sent them over the company's wires. We did
69 not return to the practice of looping on the wires after the reconstruction—that is, while I was in the employ of the Franklin Telegraph Company.

(Cross-examination by S. S. HOLLINGSWORTH, Esq.:)

I first went into the employ of the Franklin Telegraph Company in 1871, and remained with them about ten years, or 1881. Before 1871 I had been working for the Pacific and Atlantic Company. I am thirty next February. I went to the Pacific and Atlantic when

I was a very small boy. I am simply a telegraph operator and do not know what caused the inefficiency of No. 5 wire. My first experience with No. 5 was in 1874, 1875, and 1876. It was then that I first tested the wire to find out what the trouble was. I had known of its unsatisfactory condition before. I will explain: I located the trouble by having a test office in the country open the wire, and if found that the wire was clear we would have the next test office opened till we found the trouble. We did this and found the wire very badly insulated; all the insulation on the wire was poor. We had eight other wires to New York, all of which were better than No. 5. I know from my own knowledge that No. 5 was in a played-out condition. The mode of reinsulating is to put on a new insulator where it is needed.

Q. Where the insulation is good and the unsatisfactory condition of the working of the wire is due to some part of the wire itself, cannot this be remedied by the insertion of some new piece?

A. Yes, sir. I am still in the telegraph business.

Q. When a wire gets in a condition in which you found No. 5 in 1874, 1875, or 1876, when you located the trouble in it, it is due to a failure to make from time to time the necessary repairs to the wire itself and to the insulators, is it not?

A. Yes; to some extent.

Q. When they rebuilt these wires in 1879 there wasn't any special rebuilding of wire No. 5, was there?

A. I can't answer that; I don't know.

Q. When this rebuilding took place about 1879 new poles were put up?

A. Yes, sir.

70 Q. And new wires were put where they were required, and new insulators?

A. Yes, sir.

Q. And you don't know that this was done any more to No. 5 than other wires?

A. No, sir.

(Re-examination by Mr. SCHICK:)

I mean by a trouble on the wire that there is an interruption of the wire—I mean an occasional interruption of the wire, not its general condition. If a wire is worn out by rust, and so forth, from the elements of weather it is noticeable to some extent in the office. The condition of the Harrison wire in this respect was very bad. I can't tell what the ordinary duration of a wire is. I am now employed at Laughlin & McManus' office as telegraph operator. I am not in the employ of the Western Union Telegraph Company.

FRANK R. WEBB.

Sworn and subscribed before me this eleventh day of August, A. D. 1887.

JOSHUA R. MORGAN,
Notary Public.

[NOTARIAL SEAL.]

I hereby certify that the above-named witness was duly qualified and examined at the time and place set out in the caption hereof and subscribed his deposition in my presence.

Witness my hand and notarial seal this eleventh day of August, A. D. 1887.

JOSHUA R. MORGAN.
Notary Public.

[NOTARIAL SEAL.]

NEW YORK, *October 14th*, 1880.

Messrs. Harrison Brothers & Co., No. 105 South Front street, Philadelphia, Pa.

GENTLEMEN: As suggested on the occasion of our recent agreeable interview, I have re-examined the contract between us
71 and further consulted our counsel upon the points to which you called attention. The result confirms the opinion then expressed to you as to the undoubted right of either party to terminate the contract upon proper notice.

Let the following facts be understood: The original insulation of the line built for you was abandoned long ago, because entirely unserviceable; the cable for which you paid was worn out and abandoned years ago, and the wire itself has become so nearly useless that we have had to give you the use of another very much of the time during the past year in order to continue your communication. We have now nearly completed an entire new line of both wire and poles between New York and Philadelphia. When this is done there will be nothing left of the original line, which, in nearly fourteen years' use, has been worn out. Under these circumstances it cannot justly be held that the telegraph company shall continue to furnish the connection which you have hitherto had under your contract with the Franklin Company. To so hold would be to say that we should renew, whenever worn out, and forever maintain for your exclusive use, the connections you have had, because you once paid for a wire between the points. Surely nothing of the kind was contemplated when the contract was made and nothing in the contract can be so construed.

If it will better suit your convenience, we will extend the "notice" already given you, to cover another "quarter," for we not only do not wish to embarrass you, but, on the contrary, to serve you. To this end, and in view of your feeling concerning the protection of your interest in the matter, we are disposed to consider the continued maintenance of the connections you desire upon more favorable terms than we would but for our long and harmonious relations with you. Please let us hear from you as early as practicable, and oblige,

Very truly yours, A. B. CHANDLER, *President.*

72 (Endorsed:) 26. Oct. sess., 1882. C. C. U. S., E. D. of Pa. Harrison *et al. vs.* Telegraph Co. Depositions on behalf of defendant. Filed Aug. 30, 1888.

73 And afterwards, to wit, on the second day of October, in the year of our Lord one thousand eight hundred and eighty-eight, come the parties aforesaid, by their counsel aforesaid, and this cause being called for argument on final hearing and having been argued by counsel for the respective parties, and the court, being fully advised in the premises, enters the following decree:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN HARRISON *et al.*
vs.
THE FRANKLIN TELEGRAPH COMPANY *et al.* } No. 26. October Session, 1882.

74 This cause coming on to be heard upon the pleadings and proofs, and the matter being considered, the court is of opinion and doth order, adjudge, and decree that under and by virtue of the contract or agreement made and bearing date the twenty-first day of May, in the year one thousand eight hundred and sixty-seven, by and between the Franklin Telegraph Company, for their own account and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Junior, and Thomas S. Harrison, trading as Harrison Brothers and Company, manufacturing chemists of Philadelphia, of the other part, the complainants in this suit, as successors of said Harrison Brothers and Company, are entitled,
75 so long as the defendants The Franklin Telegraph Company, their successors or assigns, shall keep up and maintain the line of telegraph between the cities of New York and Philadelphia mentioned in the said agreement or any telegraph line between the said cities, to an irrevocable license, subject to the payment of six hundred dollars per annum, payable quarterly; to have the use of one wire in and upon said line in the manner provided for in said agreement, for the benefit and use of their said firm of Harrison Brothers and Company, so long as the complainants or either of them shall continue to be members or a member of said firm and the said firm shall continue to carry on the business they were engaged in at the time of said agreement or a similar business, by whatever name the said firm may be called, or whether acting
76 as a firm of individuals or under a charter of incorporation. The court therefore doth order, adjudge, and decree that the defendants, the said Franklin Telegraph Company, their successors and assigns, so long as they shall continue to maintain said line of telegraph or any telegraph line between the cities of New York and Philadelphia, do maintain in good working order a telegraph wire thereon, for the use of the said firm or corporation, so long as the complainants or either of them shall be members or a member thereof, according to the terms of said contract, and that they be enjoined from interfering with the use of said wire by the said firm or corporation in manner aforesaid. It is further ordered, adjudged,

and decreed that the defendants do pay to the complainants their costs of suit, to be taxed.

JOSEPH P. BRADLEY, *C. J.*
WM. BUTLER.

77 (Endorsed:) 26. Oct. sess., 1882. C. C. U. S., E. D. of Pa. Harrison *et al. vs.* Telegraph Co. *et al.* Decree for complainants. Filed Oct. 4, 1888.

78 And afterwards, to wit, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight, the defendants, by R. M. Schick, Esquire, comes into open court and prays an appeal to the Supreme Court of the United States in the words and figures following, to wit:

JOHN HARRISON *et al.*
vs.
THE FRANKLIN TELEGRAPH CO. *et al.*
} U. S. C. C. In Equity. Oct. Sess., 1882. No. 26.

And now, November 13, 1888, R. M. Schick, counsel for defendants, appears in open court and prays an appeal to the Supreme Court of the United States from the decree of this honorable court made October 4, 1888; whereupon the same is allowed and security fixed in the sum of five hundred dollars ($500).

79 (Endorsed:) 26. Oct. sess., 1882. U. S. C. C. In equity. Harrison *et al. vs.* Franklin Tel. Co. *et al.* Order allowing appeal to U. S. Sup. Ct. Filed Nov. 13, 1888. Schick.

80 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN HARRISON, GEORGE L. HARRISON, JR., and Thomas D. Harrison, Trading as Harrison Brothers and Company,
vs.
THE FRANKLIN TELEGRAPH COMPANY, THE Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company.
} No. 26. October Sess., 1882.

Know all men by these presents that we, The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company, as principals, and William B. Gill, No. 1938 North 13th St., and Josiah W. Dyer, residing at 1221 Spruce street, both of the city of Philadelphia, State of Pennsylvania, as sureties, are held and firmly bound unto the above-named John Harrison, George L. Harrison, Jr., and Thomas S. Harrison in the sum of five hundred dollars ($500), to be paid to the said John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of December, A. D. 1888.

Whereas lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers and Company, complainants, and The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company, respondents, a final decree was rendered against the said The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company, and the said The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company having taken an appeal, which appeal has been allowed by the said circuit court, to the Supreme Court of the United States, to reverse the said decree in the aforesaid suit:

81 Now, the condition of this obligation is such that if the said The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

WILLIAM B. GILL, [SEAL.]
Sup't of Franklin, Atlantic & Pacific, &
Western Union Telegraph Companies.
WILLIAM B. GILL. [SEAL.]
J. W. DYER. [SEAL.]

Sealed and delivered in the presence of—
SAMUEL BELL,
JOHN A. MERRICK.

Sureties approved.
WM. BUTLER, *Judge.*

[Endorsed:] No. 26. October sess., 1882. Circuit court United States. Harrison *et al. vs.* Franklin Telegraph Co. *et al.* Bond sur-appeal. Filed Dec. 14, 1888. Samuel Bell, clerk.

82 THE UNITED STATES OF AMERICA, *ss:*

To John Harrison, George L. Harrison, and Thomas S. Harrison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein The Franklin Telegraph Company, The Atlantic and Pacific Telegraph Company, and The Western Union Telegraph Company are appellants-

and you are appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 14th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

WM. BUTLER, *Judge.*

Service accepted Dec. 14th, 1888.

S. S. HOLLINGSWORTH,
Per J. C. F., *For Compl'ts.*

83 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John Harrison *et al. vs.* The Franklin Telegraph Company *et al.*, No. 26, October session, 1882, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 26th day of December, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 13,477. E. Pennsylvania C. C. U. S. No. 319. The Franklin Telegraph Company, The Atlantic & Pacific Telegraph Company, & The Western Union Telegraph Company, appellants, *vs.* John Harrison, George L. Harrison, and Thomas S. Harrison. Filed January 15, 1889.

Office Supreme Court U. S.
FILED
APR 13 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

THE FRANKLIN TELEGRAPH COMPANY, THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY and THE WESTERN UNION TELEGRAPH COMPANY,

Appellants,

against

JOHN HARRISON, GEORGE L. HARRISON and THOMAS S. HARRISON,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for Telegraph Companies, Appellants.

RUDOLPH M. SCHICK,
Solicitor for Defendants.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

THE FRANKLIN TELEGRAPH COMPANY, THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY AND THE WESTERN UNION TELEGRAPH COMPANY,
Appellants,

AGAINST

JOHN HARRISON, GEORGE L. HARRISON and THOMAS S. HARRISON,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Statement of the Case.

In the early part of 1867 The Franklin Telegraph Company owned a line of telegraph from Boston to New York; and The Insulated Lines Telegraph Company owned a line of four wires from Boston, through New York and Philadelphia, to Washington. At the same time the firm of Harrison Bros. & Co., the appellees, had a contract with The Insulated Lines Telegraph Company, the terms of which do not appear in this case. The Insulated Lines Company at the time had a large

bonded and floating debt, their lines of wire were in very bad order, and they were conducting their business at a constant loss. The Franklin Telegraph Company was in a prosperous condition and doing a profitable business.

Negotiations were pending between these companies for a consolidation, or rather a merger of the Insulated Company into The Franklin Company. This company, however, was not willing to make the consolidation and carry out the contract which the Insulated Lines Co. had made with the appellees. Negotiations were therefore begun with the appellees for a surrender of that contract and the making of a new one with the Franklin Co., which resulted in the contract which is the subject of this suit. In the meantime, or shortly after the negotiations with appellees were concluded, the proposed merger of Insulated Lines into the Franklin Co. took place.

THE CONTRACT IN QUESTION is dated May 21, 1867, is between the Franklin Telegraph Co., for their own account and on behalf of the Insulated Lines Telegraph Co., of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Junior, and Thomas S. Harrison, trading as Harrison Brothers & Co., party of the second part. It provides that the party of the first part in consideration of the relinquishment by the party of the second part of the contract which they had with the Insulated Line Co. grant to them the right to put up, maintain and use a telegraph wire between New York and Philadelphia upon the poles of the Franklin Co. or of the Insulated Line Co., with the privilege to allow four other persons to use the same,

they and their said licensees to have priority in the use of the wire, and the telegraph company to have the use of it when not in use by the others. In consideration of such use the telegraph company agreed to keep the wire in good working order. They also agree to bear all expense of batteries connected with the wire. At the expiration of ten years the contract provides that the said wire is to become the property of the telegraph company, "after which time [it] agrees to lease the same to the party of the second part for the use of themselves and such four other persons as the parties of the second part shall suffer and permit or license to use the same for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part." The appellees further agree that no assignment of their right under the agreement should pass the right to demand the lease at the expiration of the ten years which was declared a personal privilege; and, further, that they would not license any banker, broker, telegraph or railroad company to use the wire. There is a provision for a reference in case of disagreement, and in case the appellees should not be satisfied with the award. The telegraph company reserves the right to purchase the wire at a valuation, and that, "with the above exception, the appellees had the right to transfer." The contract then provides that no change in the firm or firm name of the appellees shall vitiate their right or title or destroy its continuance; limits the right of appellees and their licensees to their own mercantile and personal business; or, if they should transmit other messages, they agree to collect regular tolls and pay over the same

weekly to the telegraph company; or, in default thereof, should pay four times the current rates as liquidated damages; and, if the clause should continue to be violated, the offending party, whether the appellees or one of their licensees, should forfeit his rights under the contract. Finally the telegraph company agreed that its debts, whether present or future, should not affect or injure the rights of the appellees or impair their title to their wire, and in case the said wire should be out of order it would transmit the messages of the appellees and their licensees from its own offices.

After the execution of the contract the appellees strung the wire on the poles of the telegraph company at a cost of something over $10,000. It was accepted by the telegraph company, and the contract was faithfully executed by all parties to it for the ten years provided for in the agreement.

In the meantime, on June 14, 1876, the Franklin Telegraph Co. leased its property and franchises to the Atlantic and Pacific Telegraph Co. The term of ten years provided for in the contract expired on May 21, 1877. The wire erected by the appellees then became the property of the telegraph company. No new agreement was then made with reference to the wire, but the appellees and their licensees continued to use the same under their agreement for several years, until on August 19, 1880, the president of the Atlantic and Pacific Telegraph Co. wrote them that their business, and that of their licensees, had deprived the company more and more of the use of the wire, until it then found itself furnishing the exclusive use of a wire, maintaining and supplying battery for it for $600 per

annum. This he said could not be afforded, and was not contemplated by contract. He therefore gave notice that his company would consider it terminated on November 21st, 1880 (see letter in full, printed in Complainant's Bill, p. 6 of Record.) It appears from the testimony (p. 25 of Record) that the privileges then enjoyed by the appellees at the rental then charged to and paid by the telegraph company for the same service was either $11,600 or $7,600 per annum, according to whether they had four connections in each city, or only in the one city. This notice of August 19, 1880, led to an interview and another letter to appellees dated October 14, 1880 (p. 38 of Record), in which the president of the telegraph company informs the appellees that the original insulation of the line built by them was abandoned long before, because entirely unserviceable ; that the cable for which they paid was also worn out and abandoned years before, and that the wire itself had become so nearly useless that they had been obliged to give them the use of another wire very much of the time during the year then past in order to continue their communication, and that they then had nearly completed an entire new line of both wire and poles, and when this would be done there would be nothing left of the original line, which, in nearly fourteen years' use, had been worn out. The testimony of Frank R. Webb (p. 36 of Record) also tends to prove that the wire erected by appellees was useless, and was removed from the poles.

Other correspondence followed (see letter of October 25, 1880, in Appellees' Bill, p. 6 of Record), and finally, May 20, 1882, a formal notice was given to appellees of

a final termination of the agreement, to take place on November 21, 1882 (see Appellees' Bill, p. 7 of Record). This notice resulted in the filing of the bill in this case by the appellees.

The case was heard in the Court below on bill, answer and proofs, and the Court held and decreed that, under the agreement of May 21, 1867, the appellees are entitled, so long as the Franklin Telegraph Co., their successors or assigns, shall maintain a line of telegraph between New York and Philadelphia, to an irrevocable license, subject to the payment of $600 per annum, to have the use of one wire upon said line, as provided in the agreement, so long as the complainants, or either of them, should continue to be members of the firm, and ordered that the telegraph company do maintain a telegraph wire in good order for the use of appellees, and that they be enjoined from interfering with its use by them (see decree, p. 39 of Record).

Specification of Errors.

1. The learned Court below erred in that ordered, adjudged and decreed that under and by virtue of the contract or agreement made and bearing date the twenty-first day of May, 1867, by and between the Franklin Telegraph Co. for their own account, and on behalf of the Insulated Lines Telegraph Co. of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., of the other part, the complainants in this suit, as successors of said Harrison Bros. & Co., are entitled, so long as the defendants the Franklin Telegraph Co., their successors or

assigns, shall keep up and maintain the line of telegraph between the Cities of New York and Philadelphia mentioned in the said agreement or any telegraph line between the said cities, to an irrevocable license subject to the payment of six hundred dollars per annum, payable quarterly.

2. The learned Court below erred in ordering, adjudging and decreeing that the said Harrison Bros. & Co., complainants in this suit, shall have the use of one wire in and upon the line of telegraph between the Cities of New York and Philadelphia in the manner provided for in said agreement, for the benefit and use of their said firm of Harrison Brothers & Co., so long as the complainants or either of them shall continue to be members or a member of said firm, and the said firm shall continue to carry on the business they were engaged at the time of said agreement or a similar business, by whatever name the said firm may be called, or whether acting as a firm of individuals or under a charter of incorporation.

3. The learned Court below erred in that it did order, adjudge and decree that the defendants, the Franklin Telegraph Company, their successors and assigns, so long as they shall continue to maintain said line of telegraph, or any telegraph line between the Cities of New York and Philadelphia, do maintain in good working order a telegraph wire thereon for the use of the said firm or corporation so long as the complainants, or either of them, shall be members or a member thereof, according to the terms of said contract, and that they be enjoined from interfering with the use of

said wire by the said firm or corporation in manner aforesaid.

4. The learned Court erred in that it did not decree the dismissal of the bill of complaint.

5. The learned Court below erred in that it ordered, adjudged and decreed that the defendants do pay to the complainants their costs of suit.

ARGUMENT.

The decision of this case depends upon the proper determination of the question, What is the nature of the interest or rights which the appellees acquired under the contract of May 21, 1867, after the wire put up by them became the property of the appellants, as it did after the expiration of ten years from the date of the agreement ?

The clause of the agreement under which their interest arises is found at the top of page 3 of the Record, and is as follows :

"At the expiration of ten years the party of the second part agree that their private *wire* shall belong to the parties of the first part ; after which time the parties of the first part agree to lease *the same* to the party of the second part for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use *the same* for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part."

The Court below, in its decree, express the opinion that the appellees are entitled to an "irrevocable license," subject to the payment of six hundred dollars per annum.

The Contract is an Agreement for a Lease of the Wire.

The appellants submit and insist that the contract is an agreement for a lease of the wire to appellees to begin when the wire should become the property of the telegraph company, and to continue for one year; that as the appellees occupied it for that year and for the next year they became tenants from year to year; that it was in the power of the appellants to determine that tenancy at the end of any year by a proper notice, and that, having given that notice, the interest of the appellees ceased.

It is not disputed that the wire became the property of the telegraph company at the end of the ten years. The contract is express upon the point, and all the relations between them and the appellees since that date have been based upon that fact. The appellants therefore had a property which was capable of being leased.

It is also evident that the wire which thus became the property of the telegraph company, that wire and no other wire is the subject matter of the contract. In the portion of the contract above quoted, after the provision of the contract that appellees' "private wire" shall belong to the telegraph company, it is provided that "the parties of the first part agrees to lease the THE SAME [WIRE] to the party of the second part for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use THE SAME [WIRE]." Then follows the clause that no as-

signment of the contract "shall give their assignees the right to demand a lease of THE SAID WIRE;" and again, "the wire" is referred to in the next paragraph. There is, therefore, a subject matter, a demisable thing, with reference to which the parties dealt.

The use of the word "lease" in the contract is certainly entitled to weight when we seek to determine whether the parties meant to give an interest which would amount to a lease, or only to give a license. Thus, in the clause of the agreement under which the question arises, "the parties of the first part agree to LEASE the same to the party of the second part," and the clause following denies to their assignees "the right to demand a LEASE of the said wire." The use of the words "license" and "licensee" also supports the proposition that the parties used the words in a technical sense. Thus, in the very clause in question recognizes the distinction between the two; so read "agree to LEASE the same to the party of the second part for the use of themselves and such other four persons or firms as the party of the second pait shall suffer and permit or LICENSE to use the same;" and these four persons are designated five times in the agreement as "LICENSEES." The distinction between a LEASE and a LICENSE was, therefore, present to the minds of the parties, and, advised as they were by eminent counsel (Record, p. 26, at top), it will not be lightly construed, it is submitted, that they did not mean what they said, and that when they said "*lease*" they intended a "LICENSE."

The appellees took an interest in this wire. The word interest is defined in Black's Law Dictionary as—

"The most general term that can be employed to denote a property in lands or chattels. * * * More particularly, it means the right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share."

Certainly the appellees had the right to have the advantage accruing from this wire. In the first place, the use of it was a thing of great value to themselves. During the time they have had the use of this wire at $600 per annum under this contract, other customers for the same privilege, paid the appellants $4,200 per annum (Record, p. 34); and if the rights of their licensees be added, they were receiving a service for which others would have been charged $11,600 (Record, p. 35). The difference between having an interest and having no interest is well illustrated by the difference between the rights of the appellees and those of their licensees. The latter could not intermeddle or deal with the wire. Under their license from the appellees they could transmit their messages and no more. But the appellees had absolute control over the wire. They could give the permission to their licensees and revoke it at their pleasure. They could charge for the privilege all they could get for it and might auction it to the highest bidder. Thus this privilege might become of great value to them, and this profit was derived from their possession of and right to use the wire. It is impossible to distinguish this possession and right to use from that enjoyed by a tenant of real estate with a right to sublet.

That it was intended to confer an interest on the appellees is further shown by the provision in the con-

tract against an assignment of their interest (Record, p. 3, first paragraph).

But this possession of an interest in the thing is one of the leading distinctions between a LEASE, or other estate passing by grant, and a LICENSE. Thus this Court in De Haro vs. United States, 5 Wall., 599, says "There is a clear distinction between the effect of a license to enter lands uncoupled with a interest and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas, a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest and is revocable at the pleasure of the party making it." Also, in Wood vs. Leadbitter, 13 Mees. & W., 843, ALDERSON, B., quotes Lord Chief-Justice VAUGHAN as follows:

"A dispensation or license properly passeth no interest, nor alters or transfers property in anything."

The interest which appellees took under this paper has other characteristics of a lease. It has a time of beginning. It was to begin "at the expiration of ten years" from the date of the paper—that is, on May 21, 1877, "after which time" the telegraph company agreed to lease the wire. It has also a time for ending. It is true, the time is not expressed, but it is an agreement to lease the wire "for the sum of six hundred dollars per annum, payable quarterly," and, by construction under the authorities, that is a lease for one year. The exact point is decided in Lesley vs. Randolph, 4 Rawle, 123. The instrument construed there read thus:

"We have this day rented of George F. Randolph

the store No. 241 High street; the rent to be eight hundred dollars per annum, payable quarterly."

The Court said:

"Now the lease or agreement in the case under consideration is not expressly for any determinate period of time, and it is only by construction that a limitation can be affixed to it. It, at an early period in England, would have been considered a letting at will, but as it is not so in express terms, it would at the time of our revolution have been deemed a lease from year to year; and more especially so, as an annual rent is reserved to be paid (2 Bl. Com., 147, Chitty's Ed. and note (11); Adams on Eject., 102-3). Sir William Blackstone says, speaking of tenancies at will: "Courts of late have rather held them to be tenancies from year to year, so long as both parties please; especially where an annual rent is reserved" (2 Bl. Com., 147) In Bree vs. Lees, 2 Bl. Rep., 1173, Lord Chief-Justice DE GREY says: "All leases for uncertain terms are *prima facie* leases at will; it is the reservation of an annual rent that turns them into leases from year to year." And Sir J. MANSFIELD, Chief-Justice, in Richardson vs. Langridge, 4 Taunt., 131, lays down the same rule in a case put by him by way of illustrating it in the following words: "If there was a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the time, it is an implied letting from year to year."

This case is followed in Hey vs. McGrath, 32 P. F., Smith (Pa.), 310 (A. D. 1876).

The fact that a certain time was fixed by the agreement has a most important bearing on the question whether it was intended to create a LEASE or a LICENSE. The fact that a certain time was contemplated by the parties is incompatible with the position that a lease was intended. All the authorities are to that effect. In 15 Viner's Abr., 92, it is said: "If a man license me to enter into his land and to occupy it for a year,

half a year, or such like, *this is a lease* and so shall be pleaded." This is cited in Doolittle vs. Eddy, 7 Barb., 74, 78; also in Cook vs. Stearns, 11 Mass., 533. PARKER, C. J., said:

"But licenses which in their nature amount to the granting of an estate, for ever so short a time, are not good without deed and *are considered as leases.*"

In Mumford vs. Whitney, 15 Wend., 380, Chief-Justice SAVAGE said:

"If A agrees with B that he may enter upon his land and occupy it for a year, that is not, properly speaking, a license merely; it is more, *it is a lease*, and if no term be specified in the agreement it is an estate at will. In Smith vs. Simons, 1 Root (Conn.), which was an action for erecting a mill dam on plaintiff's land, defendant relied on a writing from a former owner of plaintiff's land granting to him the right of flowing said land for twelve years without restriction and for eighty years in the winter half of the year. The defense was not sustained, the Court saying of the writing, '*It is a lease* and without being recorded is void as to purchasers.'"

It was argued in the Court below that the parties could not have contemplated a technical lease, because a lease always confers exclusive possession on the lessee, and such possession was not conferred here. It is submitted, however, that the possession of the wire, which the contract in the case requires, and which was actually given, is all that is necessary in order to establish the relation of landlord and tenant. The clauses regulating the use of the wire by the respective parties is in that part of the contract relating to the first ten years, while the wire belonged to the appellees, and they are incorporated into the part relating to the subsequent time by reference. The contract, grant-

ing to the appellees "the right to put up, maintain and use" the telegraph wire, continues:

"and the party of the second part [the appellees] are privileged, at their option, to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of the said wire, for the transmission of messages free of all expense. The party of the first part [the telegraph company] to have the use of the same when not so employed. And in consideration of allowing the use of the said wire to the party of the first part when they, the said parties of the second part [the appellees] and the licensees aforesaid, are not using the same the party of the first part [the telegraph company] agrees * * * to keep and maintain at their own expense the said wire in good working order." Further on the contract provides, after the wire becomes the property of the telegraph company, for the lease to the appellees, for the annual rental, &c., "and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part" (the telegraph company).

It appears from the contract, therefore, that the appellees had the right to the exclusive possession of the wire for the transmission of messages by themselves and their licensees, so long as they might wish to use it. It is true the telegraph company had the right to use the wire "when not so employed," but whatever may have been the expectations of the telegraph company, and the practice of the early years of the contract, it is clear that by the contract, its use of it was entirely in the control of the appellees, and that really the telegraph company was their fifth licensee, with rights subordinate to theirs and those of the other four licensees. The appellees were under a constant temptation to further limit the use of the wire by the telegraph company by giving licenses to firms having a larger and larger business, who would, of course, be

willing to pay more and more for the privilege, until ultimately the telegraph company would be entirely excluded from its use. This condition of affairs did finally actually arise, as appears from the letter of the telegraph company to appellees set out in their bill (Record, p. 6).

That the right of the telegraph company to use the wire under such conditions did not derograte from the full control of the wire by the appellees, so as to take from the contract its quality as a lease, is amply sustained by the authorities. The question is analogous to those arising in cases where "suites" or "flats" are rented. In such cases, it is said in Taylor's Landlord and Ten., Sec. 66 (8th Ed.):

"Where these flats are separate tenements, though under one roof, yet if the owner does not reside as such on the premises or retain control of the whole, a letting will create tenancy and interest in real estate, though there is an outer door or gate in charge of a porter, as the tenants have an equal control thereof, or easement therein, and may maintain trespass *qu. cl. fregit* for any unlicensed entry by the landlord. A lodger, on the contrary—though the term is not a technical one—means one who occupies a portion of a tenement which is under the control or in the occupancy of another."

Among the cases cited in support of the author's text is The Queen vs. St. George's Union, L. R., 7 Queen's Bench, 90, 97, 98, which arose as to the building known as the Westminster Chambers, containing 117 suites of rooms; whether or not they were properly assessable as 117 tenements, and it was held that they were, COCKBURN, C. J., saying:

"The only criterion is whether the landlord retains the control of the outer door, and has shown by his retaining the control of the outer door that he has control of the whole of the premises."

BLACKBURN, J. (p. 100), * * * said:

"The question whether or not the owner had let a portion of an entire house depends on the agreement; whether or not the agreement was such as to put the tenant in exclusive possession or merely as an agreement to let to him as a lodger or inmate, the occupation of the whole of the house being retained in the landlord."

A similar question arose in Porter vs. Merrill, 124 Mass., 534, and it was held that:

"A contract in writing to let, for a precise time and for a definite weekly rate, certain specified rooms in a house, divided up into sets of rooms and containing a restaurant, is a valid lease, although the lessor undertakes to serve a private table in the rooms let and to furnish certain other accommodations, and imposes certain restrictions on the manner of the use and occupation."

In this case the lessor was to do chamber and parlor work, to heat the rooms and serve a private table, and keep the linen in good condition; all without extra charge.

In all of these cases a certain control over the premises demised was retained by the landlord, yet the instrument under which the tenant held was construed to be a lease, and the tenant to have an interest in the land. In all large office buildings the landlord assumes the duty of performing janitor service and has a right of entry on the demised rooms for the purpose, and sends his steam for heating, and his gas and electricity for lighting through them, and certainly that does affect the interest which the tenant has. The legal control of the property remains in him, notwithstanding these privileges and duties of the landlord.

In the same way, the control of this telegraph wire

was in the appellees, who could regulate the extent of the use of it by the telegraph company or could exclude it altogether. It was the duty of the telegraph company also to pay the expense of batteries, in other words, supply the electric fluid, but this is nothing more than the landlord of the large office building does as to heat and light, and does not derogate from the control of the wire by the appellees.

Another class of cases presenting analogous features are leases of seats or boxes in a theatre. In Lader vs. Moody, L. R., 20 Equity, 145, a lease of a row of seats for a period of years was construed by the Court. Sir G. JESSEL on p. 152 said :

"I have no doubt that in substance it is a lease of the boxes and stalls for all theatrical purposes, if I may say so ; in addition it is a legal demise of the boxes and stalls themselves."

Drew vs. Peer, 93 Penn. St., 234, was an action brought by the holder of a *reserved* seat from a theatre. The Court said :

"We incline to the opinion, however, that as purchasers and holders of tickets for particular seats they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance on that particular evening."

In Morse vs. Cheney, 22 Fed. Rep., 380, a lease of a single section and seat in a theatre for a period of years came before BLATCHFORD, J., and was treated as a lease.

In all of these cases the right of the lessee of the seats, or the holder of the ticket for the seat, to occupy the seat was during the theatrical performance. Dur-

ing all the other hours of the day the right of occupancy was in the proprietor, yet the interest is held to be that of a tenant. The same principle applied to the case at bar will determine that the restricted right of the telegraph company to use this wire, and the duty of supplying the electric fluid, does not affect the appellees' control of the wire or turn that into a LICENSE which, without it, would be a LEASE.

The question of the nature of a lease as distinguished from a license came before this Court in The United States vs. Gratiot, 14 Pet., 531, a case relating to the lead mines in Illinois. The Act of Congress of March 3, 1807, gave the president authority "to lease any lead mine * * * for a term not exceeding five years." The paper in question was entitled a "License for Smelting," and provided:

"That the party of the second part is hereby permitted * * * to purchase and smelt lead ore at the United States lead mines, on the upper Mississippi, for the period of one year from and after the date hereof, upon the following condition."

A subsequent clause provided:

"The second party is allowed to have as much fuel as will suffice, without waste, for the purpose of this indenture, and to cultivate as much land as will suffice to furnish his teams, &c., with provender."

It was argued that this instrument was not such as contemplated by the act. Mr. Benton argued:

"The action of the agent is set forth in the record; not that he has granted a LEASE, but that he has granted a LICENSE. A license is not authorized. The license does not locate the person to whom it is given in any particular place. It gives him a right to go where he pleases. This is contrary to the usual forms of the law, and it interferes with the provisions of the

land laws. The license is not to work mines, but 'to purchase ore' 'and lead' 'and timber.' All this is unauthorized by the Acts of Congress."

But this Court said:

"This contract purports to be a license for smelting lead ore, and it is objected that this is not a lease within the meaning of the Act of Congress. But this objection is not well founded. It is a contract for one year, and of course within the time limited by the law, which gives to the president authority to lease for five years. Is it then a lease? The legal understanding of a lease for five years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. The contract in question is strictly within this definition. * * * This contract is for the possession of land. The work is to be performed at the United States lead mine and must, of course, be performed within the limits prescribed by law to be attached to such mine. And there is an express permission to use as much fuel as is necessary to carry on the smelting business, and to cultivate as much land as will suffice to furnish teams, &c., with provender; and there is an express reservation of the rent of six pounds of every hundred pounds of lead smelted."

It is submitted that the contract in the case at bar is also within the definition of a lease given in the case cited. It is "a contract for the possession and profits of" this wire, which may easily be shown to be "land" if that were necessary. It is also, as we have seen, "for a determinate period," and this subject must be again referred to. This contract also provides for "a recompense of rent."

Another circumstance which shows that the parties to this contract did not consider that the interest conferred was a mere license is to be found in the provision against an assignment by the appellees. This

Court, in De Haro vs. United States, 5 Wallace, 499, 6, after defining a license, adds :

" It ceases with the death of either party and cannot be transferred or alienated by the licensee."

But the parties here felt that they were dealing with more than a mere privilege or authority, for they stipulated (Record, p. 3) :

" The party of the second part, however, agree that no assignment by them of their right under this contract shall give their assignees the right to demand a LEASE of the said wire after the expiration of the ten years, which right is to be a personal privilege of the party of the second part or of that firm for the time being."

The terms of this provision of the contract indicate that the parties considered that the services rendered by the telegraph company were to be a sufficient compensation for the transfer to it of the property in the wire. These services were the use of the companies' poles to sustain the wire for the whole period of ten years without compensation, and the gratuitous supply of battery power for the same period. This is further indicated by the provision (see Record, p. 3), that in case of a disagreement between the parties, and an award of arbitrators thereon, which should be unsatisfactory to the appellees, then the telegraph company might "purchase the said wire at a fair valuation, to be determined by referees." Therefore, in the two contingencies of a transfer by appellees of their right during the ten years, while the property of the wire was in them, and a purchase by the telegraph company during the same time, the parties considered only the value of the

contract during the first ten years, the wire being liable to become the property of the telegraph company at the end of that time. Until the wire shall become the property of the telegraph company it was bound to render the services contracted for, either to the appellee or their assignee, the right to assign during that period being given expressly (see Record, p. 3), in the words "with the above exception the party of the second part has the right of transfer;" and the same right being impliedly given in the paragraph on same page of record which is quoted just above. But as soon as the wire became the property of the telegraph company the right of the appellee to assign ceased. We submit that it is a plain inference from this, that the parties considered that such services rendered by the telegraph company for ten years were a sufficient compensation for the wire. If this is true, even if the paper should confer only a license, where in the case will be found the executed consideration on which to base the irrevocability of the license? If the services of the telegraph company during the ten years paid for the wire, then the wire cannot furnish the consideration for the agreement of the telegraph company to lease the wire to the appellees. The contract may then be regarded as if the company had made an agrement for the lease of a wire erected by themselves "for the sum of six hundred dollars per annum;" and surely no one would pretend that such a contract would create an irrevocable license. If the services rendered by the telegraph company during the ten years were not considered an equivalent for the wire, then the contract of the parties was a cumbrous and artificial scheme such as business men would

never have devised. The natural and common-sense thing for the parties to have done would have been to allow the appellees the use of the wire gratis until the services rendered should be the equivalent of the wire; or, if they should never be of sufficient value, then until the wire should be worn out and become useless.

The Character of the Lease to which Appellees were to be Entitled at the End of the Ten Years.

If the proper construction of the contract gave to the appellee a right to demand a lease at the end of the ten years, after the wire should become the property of the telegraph company, the next question is as to the character of the lease to which they are entitled.

The contract provides that after the wire shall become the property of the telegraph company it shall

> "Lease the same to the party of the second part [the appellees] for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part."

The agreement thus provides for a lease, but does not prescribe the duration of the term, but it does provide for the payment of a fixed rent "per annum." It is submitted that under this provision the appellees having continued in possession of the wire after it became the property of the telegraph company will be held to be tenants from year to year. Thus it is said in Taylor's 'Landlord and Tenant,' Sec. 54:

"The ordinary mode of leasing is for a specified term of years; but, if no particular period is limited for the duration of a tenancy, a tenancy from year to year will arise."

And in Sec. 55 the same author continues:

"Since the time of the Year Books, however, the courts have treated a general occupation as a tenancy from year to year, whenever the reservation of rent or other circum stances indicated an agreement for an annual holding; and such tenant cannot now be turned out of possession without reasonable notice to quit."

Among the cases cited to support these propositions are:

Jackson vs. Bryan, 1 Johns., 322.
Lesley vs. Randolph, 4 Rawle, 123.
Thomas vs. Wright, 9 Sergt. & Rawle, 87.
Roe vs. Lees, 2 W. Bl., 1171.

These authorities apply to and govern this case. The notice by the telegraph company that they desired to terminate the agreement is set out in the bill (Record, p. 7).

The bill in this case is, in effect, for the specific performance of a covenant to lease the wire which is the subject of the contract, but, in the absence of a specification of the duration of the term, how can the Court make a decree? That it cannot is shown by Myers vs. Forbes, 24 Maryland, 598. In this case Forbes signed a paper as follows:

"I hereby agree to do the carpenter's work on the warehouse about to be built for Charles Myers. * * * In consideration of the above contract I hereby agree to lease of Charles Myers * * * all that lot of ground, beginning * * * The above to be divided into two lots, and the price to be $20 for each lot annually, * * * said Forbes to have

the privilege of buying out said ground rents within three years at the rate of six per cent. per annum."

Myers tendered to Forbes the sum admitted by Forbes to be the balance due on his executing and receiving the leases for the said lots, which Forbes refused, and the bill was brought to compel him to execute and receive the leases. On the argument it was contended that the Court should decree specific performance, especially as there was an entire performance of the contract on the part of Myers. But the Court refused to so decree, saying:

"The contract is altogether silent as to the term for which the intended lease was to be made. The term or duration of a lease is an essential part of it, and in the absence of any stipulation in that respect a court of equity cannot decree a specific performance of a contract to lease. * * * The length of the term is just as necessary a part of a lease as the rate of rent reserved."

The contract in this case is for an original lease on the wire becoming the property of the telegraph company. The former relations between the parties, however, make it somewhat analogous to a *renewal* of a lease. If, however, it be treated as a covenant for renewal, the result is the same. As a covenant for renewal it is a general covenant, the words being "agree to lease the same," without mentioning a term. It is submitted that such a covenant is satisfied by a lease for one year, the provision for an annual rental possibly being sufficient to obligate the telegraph company to give a lease for that period at least. Thus, it is said in Taylor, Landlord and Tenant (8th Ed.), Sec. 333:

"Nor will a general covenant *for renewal* be con-

strued to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only."

Among the cases cited in support of this proposition are Whitlock vs. Duffield, Hoffman's Ch., 110; Rutgers vs. Hunter, 6 Johns. Ch., 215, and English cases.

The same author in the same Section 333 continues:

"A covenant to renew a lease 'under the *same covenants* contained in the original lease' is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for if the continued grant of successive leases, and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such an intention. A different construction would virtually lead to a grant in perpetuity, and, where no consideration appears for a grant for so extensive a nature, such cannot be a reasonable construction."

Carr vs. Ellison, 20 Wend., 178, is cited by the author to support this proposition. It arose upon a lease by which the lessee covenanted to erect a frame house. It was agreed that at the end of the term the house should be valued, and the lessor covenanted that he would either take the house at the appraisement or "renew the lease * * * for the term of twenty-one years more for and under the same yearly rents *and under the same covenants*. It was claimed that the lessor was bound to give a lease containing a covenant for renewal. But the Court said:

"The Courts can against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement fora second renewal from a general provision for a renewal of the lease with similar covenants. * * * It is difficult to suppose that this was the intention of the parties. The good sense of the contract seems to be this: The lessee agreed to

erect a frame house on the premises; and the lessor stipulated to pay him the value of the building at the end of the term or to compensate him by the renewal of the lease 'for the term of twenty-one years more.' After the lapse of a second period of twenty-one years a wooden building could be of no great value, and the parties neither stipulated for pay nor for a further renewal of the lease."

It is submitted that the "common sense" of this contract is to be arrived at by the same course of reasoning. The parties were dealing concerning a wire, of which the longest possible life, according to the testimony, was fifteen years, and which was destroyed before the bill in the case was filed. This wire was the only subject of the contract. The parties contemplated no other. The contract speaks only of "the said wire" and "the same [wire]" repeatedly. By which of the considerations that usually influence men in making a bargain can it be said that the parties were dealing about a wire which is never referred to in the remotest way, at the same time that a certain wire is made the subject of the contract, *expressio unius*. Just as it was determined in the case cited that, from the fact that a frame building would be of little value after forty-two years, the parties did neither stipulate for pay for the building nor for a further renewal, in the same way it may be determined here that the parties could not have stipulated for the use of a thing beyond the time of its existence. There is no greater force in this reasoning here, because the parties here stipulated that after ten years the wire should be the property of the telegraph company.

The appellees recognize this fact in the prayer of

their bill (Record, p. 8, fol. 15) by praying not for the continued use of the wire in question, but that

"the said contract of the defendant the said Franklin Telegraph Company to maintain in good working order A *telegraph wire* * * * for the use of your orators and their licensees according to the terms of said contract may be specifically performed."

It is submitted that there is no such term in the contract.

The parties made one contract; the Court's decree establishes and enforces another and different contract.

This is a bill for specific execution. That is to say, the specific execution of some clear and certain contract which the parties made. If the contract is not clear and certain in its terms; if it be, as the complainants claim, unilateral, enforceable by them but not enforceable against them, or if it be harsh and inequitable in its operation and effect, the fundamental principles of equity applicable to relief by specific performance require the bill to be dismissed.

It seems to be clear that the provision for the lease of the wire at the end of the ten years is either: first, void for uncertainty; or, second, that it is, as above argued, a contract for a lease or tenancy or right to use from year to year; or, third, that it is a contract for a lease of perpetual and indefinite duration, or, at least, as long as the business of the complainants shall be carried on substantially in the present interest.

The objection to the view that the contract is void for uncertainty is that it wholly defeats, without any necessity therefor, the purpose of the parties. It can be sustained as a contract for a lease for one year, after the expiration of ten years, with a continuance so long as

both parties acquiesce in such tenancy, and until notice by either of the expiration of the lease. That this is the true view is shown by the authorities above referred to, that where there is no particular term or period limited or mentioned, the Courts construe it to be a tenancy until the one party or the other shall give notice of its termination; which is the just and reasonable view, since it makes the contract reciprocal and equal in its operation and effect. Such a view is not an arbitrary rule or doctrine, but its reasonableness is enforced and strengthened by the express provision here appearing, that the rental shall be at so much per annum.

Under this view, which is believed by us to be the true one, at the expiration of the ten years it was entirely optional with the complainants to take a lease of it or to enter upon the use and enjoyment of the wire or not. They could do that. The defendants could not compel them to do it. But if they exercised this option or right, and entered upon the enjoyment of the property, the rights and obligations of the two parties from that time onward under the lease were reciprocal. They could not enjoy such use for a single moment unless they were under an obligation to pay for it. So, reciprocally, the defendants would have the right to the rental for the whole period for which the complainants would have the right to the use and enjoyment of the wire. When the wire was worn out as the effect of time and natural causes there would at all events be a determination (there being no covenant to renew or repair) of the lease or the right of the use and enjoyment of the same. This particular subject is referred to further on. What we are now insisting upon is that

the view of the complainants, that they have a perpetual option on their part with no corresponding obligation, is an unnatural and an unreasonable construction of this contract. The contract does not contemplate the execution of a formal lease or other document. It is self-executing. It does not contemplate that the complainants at the end of the first year after the ten years may come to the defendants and say, "We do not want this wire for this year;" and then at the end of that time come forward and say to the defendants, "We do want it for the succeeding year." But it does contemplate that after the first year the rights and obligations of the parties, respectively, shall be defined by the general obligations of the law of landlord and tenant. That is to say, if no notice is given to determine the contract by either party another term for a year is created, in which the rights are reciprocal, to wit: the right of the complainants to enjoy the use and the right of the telegraph company to the payment of the rental or compensation for such use.

The contrary view was urged by the complainants in the Court below, they contending that the true construction of the contract was that it gave to the complainants, upon the payment of $600 per year, the right to the use of the wire for so long a period, one year or one hundred, as they might choose to use the same; or, at least, so long as they remained in business. That is to say, they claim that they can quit the use at any time and relieve themselves of all obligation. This we deny, maintaining that the rights are reciprocal, and that for whatever period they have the right to use we have the right to compel them to use and to pay for it.

A fundamental error of the decree below is that

it adjudges that this contract created in favor of the complainants "an irrevocable license" to the use of the wire as long as they were willing to pay $600 per annum therefor for the use and benefit of their business, they being at liberty to cease the use and acquit themselves of all obligation whenever they chose, the defendants being bound meanwhile to furnish the wire subject to their call, but with no corresponding right to require them to keep the wire and pay therefor for any determinate period.

Another fundamental error of the decree growing out of this misconception of the contract is, that it adjudges the complainants to be entitled to a telegraph wire for the use of their firm as long as they shall choose to use it, without limiting this obligation to the particular wire which was in existence at the expiration of the ten years and which was the subject matter of the contract. This provision of the decree, if there was to be one for the complainants, was essential, since it was proved that the particular wire in existence at the date of the decree was worn out and gone from the operation of time and natural causes, and was no longer in existence.

The objection to the third possible view of this contract, to wit, that it is a contract for a perpetual use of the wire at the complainants' option, or at least for a use at their option commensurate with the duration of their business, is that there is no such provision in the contract. The requirement of the defendants involved in such a claim is unreasonable, that such a construction ought not to be given to the contract unless their language clearly requires it; which it does not in this case. When the contract is analyzed it will be seen

that the complainants got the use of this wire, which they put up, for ten years, free of all charges and rentals. It was then evidently considered as paid for, and was to become thenceforth the property of the telegraph company. For the right to the use of the wire when the same was not in use by the complainants or their specified licensees, the telegraph company was to maintain and keep the same in working order and to supply it with battery power. The view urged in the Court below by the complainants is therefore not tenable, namely, that for a valuable executed consideration the telegraph company granted to the complainants after ten years' use the right to demand, upon the payment of the $600 per year, the perpetual right to use the leased wire; and therefore the argument made, that the contract should be construed to give such a right, falls.

An agreement for a new lease does not include consideration for a first lease.

Martin vs. Pycroft, 11 Eng. L. & Eq., 110.
Bell vs. Burchard, *Ib.*, 67.

But if the complainants' view is correct, namely, that they have an indefinite option to use the wire for as long as they please, and to quit when they please, this view is fatal to a decree for specific performance, since the contract is one-sided and, as shown by the proofs to be, unjust in its operation and effect. If their contention is correct, the telegraph company must perpetually furnish a wire, or according to, the decree of the Court below, so long as any one of the original parties continue to be a member of the same firm. This Court, in Wilcox & Gibbs Sewing Machine Co. vs. Ewing, 141

U. S., 629, lately passed upon such a contract, where it was said:

"If Ewing had the privilege, upon reasonable notice, of severing the connection between him and the company after 1875, upon what ground could a like privilege be denied the company?"

The fact that the same conditions exist here seems to weigh powerfully against the construction contended for, that a unilateral contract was intended to be of perpetual obligation upon the one and at the pleasure of the other.

Parol Evidence Inadmissible to Change the Contract or its Legal Effect.

There remains the question of the admissibility of the parol evidence offered to change the contract, which evidence, it is claimed by appellees, tends to prove that the parties intended that Harrison Bros. should have the perpetual use of a wire.

The objection to the admissibility of parol evidence to change the contract or the legal effect was taken by the defendants in their answer at the time such testimony was taken.

The indispensable importance of this line of testitimony to the complainants' case is recognized in their bill and in the exigency in which they found themselves in seeking to sustain the claim that the obligation to make this lease was perpetually binding not only upon the Franklin Telegraph Company, but upon the grantees of that company, to wit, the Atlantic and Pacific Telegraph Company and the Western Union Telegraph Company respectively.

It is submitted that this evidence is inadmissible because in contravention of the Statute of Frauds. The interest of the telegraph company in its line is in the nature of real estate. The tendency of all the cases is to hold it as such. The first case on the subject is Electric Tel. Co. vs. Overseers, 24 L. J., N. S. (in Exch., "Cases Connected with the Duties of Magistrates"), in which the question arose under Act of 43 Eliz., C. 2, authorizing overseers of the poor in the different parishes to raise funds by taxation "of every inhabitant, * * * occupier of lands, or houses, * * * in the said parish." The telegraph company had a telegraph line along the railroad, erected in the ordinary manner. It was held that it was ratable as an occupier of land in the parish in respect of the tele graph wires, posts and land in which the same were fixed. POLLOCK, C. B., said:

"* * * there is no distinction between a possession obtained by passing things from fixed points in space and air and passing them under earth or water. The land is equally occupied in all three cases, because the estate in it extends indefinitely upwards and downwards, and consequently, whether the wires passed up or down, the proprietors of them exclusively occupy a certain portion of space over which they have complete control and may exclude every one else from it."

Tel. Co. vs. Middleton, 80 N. Y. (35 Sickels), 408, 410, was an action of trespass *quare clausum fregit* brought in New York for cutting down and carrying away a number of telegraph poles, wires and insulators erected in New Jersey and forming part of a telegraph line. It was held, that as these things were affixed to the soil they "constituted a part of the freehold," and as such an action was local it could not be maintained in New York.

In N. Y., O. & W. R. R. vs. Tel. Co., 36 Hun, 205, the railroad company had erected a line of telegraph along its roadbed, and then agreed with the telegraph company that the latter should string another wire upon the poles, which the railroad company agreed to purchase upon the termination of the agreement. It was *held* that this wire "became real estate when fastened to the poles."

In Farnsworth vs. Tel. Co., 5 N. Y. Supp., 735, 743, that ordinarily, in the absence of an agreement providing differently, wires placed upon telegraph poles become real estate. The same contract was construed in Trust Co. vs. Tel. Co., 36 Fed. R., 288, and the same conclusion reached.

This evidence is also inadmissible, because a parol alteration of and addition to the written agreement. This is decided in Bast vs. Bank, 101 U. S., 96; Martin vs. Berens, 17 P. F. S., 462.

The rule excluding evidence offered to alter, add to or contradict a written agreement by parol has been modified in Pennsylvania; but, even as here administered, the plaintiffs are not within it; indeed, have stated themselves outside of it. The bill (Record, p. 7, fol. 14) after alleging the parol agreement, continues: "And to carry out and evidence this understanding and agreement, the document was written and executed." It is evident, therefore, that it was never intended to include it in an agreement, but that the written words were deliberately adopted as conclusively stating the intention of the parties.

In Pennsylvania such evidence is only admitted in case of fraud, accident and mistake, and in this case the bill does not aver either, and does not ask a re-

formation of the contract (Thorne vs. Warflem, 4 Ont., 526).

The reason for excluding such evidence is doubly strong in this case, because the question is no longer between the original parties to the agreement. In Section 5 of bill (Record, p. 5) it is averred that the Franklin Telegraph Co. in 1876 leased all its property and franchises to the Atlantic and Pacific Telegraph Co., and from Section 9 (Record, p. 8) it appears that subsequently the plaintiffs treated with them as parties to the contract. In Section 6 (Record, p. 5) it is averred that Atlantic and Pacific Telegraph Co. has sold and transferred all its property and franchises to the Western Union Telegraph Co. But parol evidence is inadmissable of any written contract, even in cases of mistake, to the injury of third persons who have acquired rights under it (Heelner vs. Imbril, 6 S. & R. 401 ; 3 Washburn on Real Prop., p. 382, citing Prescott vs. Hawkins, 16 N. H., 122, 127 ; Gray vs. Hornback, 31 Mo., 400).

Before such evidence will be allowed to effect a contract it must make out clearly and undoubtedly that parties did agree as alleged (Thorn vs. Warflein, 4 Ont., 526). That is not done by the evidence in this case.

Charles H. Burd, plaintiff's witness, who negotiated the contract for the telegraph company, does say (Record, p. 14, Int. 7) that he discussed the matter with the director of his company, but does not say that he discussed it with plaintiffs.

James Wentworth Brown, plaintiffs' witness, in 1867 the treasurer of the telegraph company, in answer to the fourth interrogatory on Record, page 19, says the same thing, that it was discussed between the officers

of the company. The answer of the fifth interrogatory on page 16 may possibly be construed by plaintiffs to go the entire length, but it does not. It seems rather to be his recollection of the terms of the contract, testified to nearly twenty years after its date and without having a copy before him. It is not definite as to time, place or circumstances, and entirely fails to make out any of the elements of fraud, accident and mistake.

Thomas S. Harrison, one of the appellees, is not more to the point. He utterly fails (Record, p. 23, Int. 5) to make out an agreement. He only gives such conversation as men are apt to have when arguing about the terms of an agreement.

In this it is important to note and observe the following considerations :

First. That, at the expiration of ten years, the private wire which is the subject of the contract, shall "belong to the parties of the first part;" that is, the Franklin Telegraph Company.

Second. That the parties of the first part—that is, the telegraph company, its assigns not being mentioned—agree to lease the same to the party of the second part; that is to say *(a)*, the covenant does not purport to be made in behalf of assigns, but only in behalf of the Franklin Telegraph Company, and therefore it is not a covenant that would, so to speak, run with the land, even in the hands of a grantee, during the natural life of the wire. We understand the rule to be clear that such a covenant as this, in the absence of the word "assigns," or other evidence on the face of

the contract that it was intended to run with the land, does not so run. And *(b)* that the thing agreed to be leased is a particular wire which became, at the expiration of the first ten years of the contract, the property of the telegraph company; the lease is of that particular wire and no substituted wire, and there is no covenant either to renew or to substitute another wire on the destruction by natural use and wear of the particular wire which is the subject matter of the contract.

The theory of complainants' bill and of the decree thereon which is the subject of this appeal, is that this covenant to lease was a covenant running with the principal thing granted to the telegraph company; but it surely cannot be claimed that, with the passing out of existence by natural use, wear, and tear of the principal thing, the covenant, which is a mere incident, would still survive, in the absence of a specific covenant to furnish another wire on the loss, destruction or wearing out of the wire which is the subject of the contract.

The following principles of law are applicable here to this leased wire:

A landlord who leases a house, whether for one year or for one hundred years, is under no duty to repair, much less to rebuild, without an express covenant to that effect.

1 Washburn Real Property, page *332, 4th Ed. (page 506, top), and cases cited.
Ib., *347, top, 4th Ed., 538, and cases cited.
4 Kent's Commentaries, *109.

"Even where there is a covenant by a tenant to repair, it only requires that the tenement does not suffer more than the operation of time and nature

would effect. He is not bound to go further; he is only bound to keep up the old house as an old house."

4 Kent, *109, note and authorities.
Gibbons on Dilapidations, pp. 63–71.

On the like principle: "The landlord is not bound to "renew without a covenant for the purpose, and "covenants by the landlord for continued renewals are "not favored, for they tend to create perpetuity."

4 Kent, *109.

Finally we rely for a reversal of the decree pronounced by the Circuit Court upon the essential inequity of the complainants' case. They are seeking to give an elastic construction to a contract not warranted by its terms, which, construed as the complainants claim it should be, and as the Court below decreed, is a perpetual obligation to the defendant, while it is at any time determinable by the complainants at their own will and option, and where the compensation to the defendants (grantees and assignees of the original covenantor) is inadequate and therefore oppressive and burdensome.

RUDOLPH M. SCHICK,
Solicitors for Defendants.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

Office Supreme Court U. S.
FILED.
OCT 1 1892
JAMES H. McKENNEY,
CLERK.

No. 319. October Term, 1891.

Supreme Court of the United States.

The Franklin Telegraph Company, the Atlantic and Pacific Telegraph Company, and the Western Union Telegraph Company, Appellants,

vs.

John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES.

R. C. McMURTRIE,
S. S. HOLLINGSWORTH,
For Appellees.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

Franklin Telegraph Company et al., *Appellants*,

vs.

John Harrison et al., *Appellees*.

October Term, 1891.

No. 319.

BRIEF FOR APPELLEES.

In the early part of 1867 the Franklin Telegraph Company, owning two wires from Boston to New York, desired to consolidate with the Insulated Lines Telegraph Company, which also owned wires from Boston to New York, and from New York, via Philadelphia, to Washington. A very serious obstacle in the way of this consolidation was an outstanding contract between the Insulated Lines Company and the predecessors in the title of the appellees, who were the complainants. (Record, pages 13, 14.)*

On the 21st of May, 1867, the appellees and the Franklin Telegraph Company executed a written contract, the construction of which is the subject-matter of the present litigation.

The Franklin Telegraph Company desired a good working wire between New York and Philadelphia, and the appellees were willing to string such a wire upon their poles if a satisfactory arrangement could be made. Accordingly, the following contract was made between them :—

> "MEMORANDUM OF AGREEMENT, Made this twenty-first day of May, in the year of our Lord one thousand eight hundred and sixty-seven (1867), by *The Franklin Telegraph Company* for their own account, and on behalf of *The Insulated Lines Telegraph Company* of the first part, and *Thomas Harrison*,

* The rights acquired under the contract by the then firm of Harrison Brothers & Co. became vested to the complainants, and they are for convenience called appellees.

M. Lieb Harrison, John Harrison, George L. Harrison, Jr., and *Thomas S. Harrison*, trading as *Harrison Brothers & Co.*, manufacturing chemists of Philadelphia, of the other part:

"*Witnesseth*, That the party of the first part, for and in consideration of the relinquishment by the parties of the second part to the party of the first part of a valuable contract made by the party of the second part with the Insulated Lines Telegraph Company, hereby grants to the party of the second part the right to put up, maintain, and use a telegraphic wire between the cities of New York and Philadelphia, upon the poles of the Franklin Telegraph Company, or of the Insulated Lines Telegraph Company, or of those persons or corporations whose property has lately been purchased by or consolidated into the stock of the party of the first part. And the party of the second part are privileged at their option to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of the said wire, for transmission of messages free of all expense. The party of the first part to have the use of the same when not so employed. And in consideration of allowing the use of said wire to the party of the first part when they the said parties of the second part and the licensees aforesaid are not using the same, the party of the first part agrees, said wire having first been put up to the acceptance of J. G. Smithe, the superintendent of said Franklin Telegraph Company, and accepted by him, to keep and maintain at their own expense the said wire in good working order to and between the offices of the parties of the first part in New York and Philadelphia, and between said office and the places of business of the parties of the second part and such four other persons or firms in the said cities of New York and Philadelphia. All expenses of batteries, &c., connected with the working of said wire to be paid by the parties of the first part. At the expiration of ten years the party of the second part agree that their private wire shall belong to the parties of the first part; after which time the parties of the first part agree to lease the same to the party of the second part, for the use of themselves and such other four

persons or firms as the party of the second part shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part.

"The party of the second part, however, agree that no assignment by them of their right under this contract, shall give their assignees the right to demand a lease of the said wire after the expiration of the ten years, which right is to be a personal privilege of the party of the second part or of that firm for the time being.

"It is further agreed that the right of giving the use of the wire to four other parties shall be exercised by the party of the second part or their assignees only by giving the same to any person or firm not being a telegraph company, a banker or stock or exchange broker, or railroad company.

"And in case the party of the second part shall procure a charter to carry on the business they are now engaged or a similar business, the privileges and rights of the party of the second part shall enure to said corporation in like manner as if such corporation had been named as the party of the second part herein.

"In case of any disagreement on that or any other point embraced in this contract, the decision of the same shall be left to two disinterested persons mutually chosen by the parties hereto, with a right to call in a third as umpire, whose decision shall be final.

"In case those objections are held valid by the arbitrators and not acquiesced in by the parties of the second part, the party of the first part reserves the right to purchase the said wire at a fair valuation, to be determined by referees in the same manner as any other matter in this agreement, with the above exception, the party of the second part has the right of transfer.

"No change in the firm or firm name of the party of the second part, or those interested through them by death or retirement or by addition of members to said firm, or from other cause, shall vitiate the right or title of the party of the second part under this contract or destroy its continuance in full force to

such new firm and the members thereof as if they were named herein.

"The parties of the second part, and those interested through them, are not to do other than their own legitimate mercantile and personal business. Should they be willing to transmit any other messages, they are to charge the company's regular tolls and hand the same over weekly to the proper officers of said companies without discount or diminution.

"In case of a violation of this contract in this respect by the party of the second part or their licensees, they shall respectively pay the parties of the first part four times the current rates of similar messages and the expenses of recovering the same as liquidated damages, and if this should continue and be found by arbitration to have been intentionally persisted in, it shall terminate this contract against the offending party, whether Harrison Bros. & Co., or either of their licensees.

"It is agreed by the Franklin and Insulated Lines Telegraph Companies that no debts at present made or hereafter contracted shall in any way affect or injure the rights of the parties of the second part under this agreement, or impair their title to the wire put up by them on the poles of said companies.

"In case the said wire shall at any time be out of order or incapable from any cause of being used, the parties of the first part will transmit the messages of the party of the second part and their licensees from any of their offices to and from New York and Philadelphia in regular turn, with all other messages received for transmission free of all charge and expense.

"*In Witness Whereof*, The said parties of the first part have hereto caused to be affixed their corporate seal, dated the day and year aforesaid.

SEAL.

"THE FRANKLIN TELEGRAPH COMPANY,

"By JOSEPH B. STEARNS,
"*its President.*"

In presence of:

[U. S. R. Stamp 5c.]

(Record, pages 2, 3, and 4.)

This contract has been fulfilled by the appellees, who erected a wire between Philadelphia and New York at an expense of a little over $10,000, and the telegraph company or their successors in title have given the appellees the use of the wire between Philadelphia and New York from that time until the present, appellees paying therefor, after ten years had expired, $600 a year. No other agreement concerning the use of this wire has been executed since the contract of 1867.

Shortly before the filing of this bill appellees were notified that at the expiration of six months from the date of the notice the contract would be terminated by the Franklin Telegraph Company. The bill was filed to enjoin such action upon the part of the telegraph company, and the only question in the case is whether the company has the right to terminate the contract after a reasonable notice, or whether the contract can be terminated only at the option of the grantees of the right to use the wire.

ARGUMENT.

The contract provides: First, that the appellees, in consideration of their relinquishment of a valuable contract with the Insulated Lines Telegraph Company, should have the right to put up, maintain, and *use* a telegraph wire between New York and Philadelphia upon the poles of the Franklin Telegraph Company. The use, however, is not an exclusive one. It is provided that in consideration of allowing to the telegraph company the use of the wire, when the party putting it up and their licensees should not be using it, the telegraph company shall keep the wire in working order and pay all expenses, including batteries, &c., connected with the working of the wire.

There is no limitation expressed as to the duration of the right thus granted in the contract, unless one can be spelled out from the following provision found on page 3 of the record: "At the expiration of ten years the party of the second part agree that their private wire shall belong to the parties of the first part; after which time the parties of the

first part agree to lease the same to the party of the second part for the use of themselves and such other four persons or firms as the party of the first part shall suffer and permit or license to use the same, for the sum of $600 per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up by the parties of the first part."

In examining this paragraph it will be noticed that it contains no express limitation upon the duration of the right granted to the users of the wire. The only difference this paragraph makes in the contract is, that after the expiration of ten years it places upon the users of the wire the obligation to pay the sum of $600 a year for its use. This amount was six per cent. on the cost of the wires. In other words, the users were to have the use of the wire free for ten years, and then the property in the said wire which they had put up was to vest in the telegraph company, and they were thereafter to receive six per cent. per annum on the cost of the property which they would then own for its future use.

This is all that this particular portion of the contract seems to have been intended to provide for.

The use of the word *lease* in this clause does not have the effect of attaching to this agreement the incidents of a technical lease of real estate, as the right to terminate it upon reasonable notice.

"An instrument cannot operate as a lease, although words of demise are used therein, if it is evident that such was not the intention. Thus a lease for years or for any specific term is a contract for the *exclusive* possession of lands or tenements. Consequently, an instrument that *merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land, and is not a lease, but a mere license*, and a similar right may be given to others if it does not interfere with the exercise of the right conferred upon the licensee." Wood on Landlord and Tenant, section 227.

Unless the possession is exclusive, a contract does not create a lease. In Funk *vs.* Haldeman, 53 Pa. St., 229, the court say

on page 243, quoting from and adopting Bainbridge on Mines: "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit *à prendre*, and may be held apart from the possession of land. In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license, and though the licensee will certainly be entitled to search and dig for mines according to the terms of the grant, and appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover."

In the present case it will not be contended that ejectment could be brought by the grantees of the right to use this wire had they been legally prevented from using it by the telegraph company.

A very interesting note by Judge Holmes on the distinguishing characteristics of a license, a lease, and an easement may be found in third volume of Kent's Commentaries,* page 452, note 1 (12th edition).

The illustration of a license there referred to is that of furnished lodgings, where, even though the lodger has the exclusive enjoyment of the rooms, the possession and care still remain in the landlord, who employs servants to look after them. While, on the other hand, if the agreement gives not only the exclusive enjoyment, but the right of exclusive possession, and the landlord has nothing to do on the land, it becomes a lease. The cases cited by the appellant in his brief in regard to the renting of suites or flats are entirely consistent with this doctrine.

Other cases emphasizing this distinction are:—

Hill *vs.* Tupper, 2 Hurlstone & Coltman, 120, where an incorporated canal company had granted to the plaintiff by deed

the sole and exclusive right of putting or using pleasure boats for hire on their canal. This was held to be only a license, even though for the purpose specified, namely, the use of pleasure-boats, it was exclusive, for the company still retained the right to use it for other purposes.

Taylor *vs.* Caldwell, 3 Best & Smith, 826, where there was a contract whereby A. agreed to let, and B. agreed to take, on certain terms and at a specified rent, a music-hall for four days. Blackburn, J., says, on page 832: "The parties inaccurately call this a 'letting,' and the money to be paid a 'rent;' but the whole agreement is such as to show that the defendants were to retain the possession of the hall and gardens, so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days."

The doctrine set forth in these cases, and which seems to be firmly established both on authority and in reason, has a direct application to this case. The wire was not to be in the exclusive possession of Harrison Brothers & Co., nor were they even to have the exclusive use of it, for at all times when they were not employing it it was to be used by the telegraph company if they wished to do so, and the care and control of it, and the furnishing of battery-power, &c., were entirely in the hands of the latter. All of which considerations show that the rights conferred by this contract have none of the incidents of a lease. Under these circumstances it will scarcely be contended that the mere fact that the word lease was employed in this portion of the contract necessarily operates to make the contract a lease, and to import into it the technical incidents of a lease.

In the next place, the remaining provisions of the contract to be found on pages 3 and 4 of the record are absolutely inconsistent with the existence of a right to terminate the contract at the option of the grantors of the right. The very next section is in the following words:—

"The parties of the second part, however, agree that no assignment by them of their right under this contract shall give their assignees the right to demand a lease of the said wire after the expiration of ten years, which right is to be a personal privi-

lege of the party of the second part or of that firm for the time being."

The insertion of this provision in the contract was absolutely unnecessary if there existed a right in the grantors to terminate the contract at their option.

The next paragraph also is unnecessary if this optional right of termination existed. In fact, every clause of the contract which imposes a restriction on the right of using the wire is unnecessary, because the control of that subject would be absolutely in the grantors, if they had the right to terminate the contract at any time. What reason was there for inserting an arbitration clause in case of disagreement, if one party had the right to terminate the contract? One clause of the contract expressly provides that if it shall be found by arbitration that the grantees of the right to use the wire persist in sending messages other than those relating to their own legitimate mercantile and personal business over the wire, "it shall terminate the contract against the offending party." If the right to terminate it already existed in the grantors, this provision was not necessary.

If it be said that these clauses were intended to protect the telegraph company during the first ten years of the contract before they became the owners of the wire, the answer is, that while this may be true as to the arbitration clause, it certainly is not true with respect to the clause last cited, which provides for a termination of the contract, because that clause does not provide in the event of such termination that the wire should become the property of the telegraph company, and if it was intended to protect the telegraph company during the first ten years it would have required some such provision. Nor does it appear in the provision in regard to assignment first quoted.

We are justified, therefore, in stating that not only is there no language in the contract indicating an intention to make the contract terminable at the option of either party, but that there are many provisions in the contract pointing in the other direction, and whatever doubt there may be about some of these provisions, certainly one beyond any question—that in regard to the rights of an assignee of the contract—is absolutely

inconsistent with the existence of any such right to terminate the contract.

Since the contract is not a lease terminable at the option of either party it is an irrevocable license. It is a permission by the telegraph company to use one of its wires, with no express limitation in regard to the duration of such user. It is a permission given, first, in consideration of the surrender of a valuable right under an existing contract with another telegraph company, which became consolidated with the grantor at the time this contract was made; a right of such a character that that grantor was unwilling that such a consolidation should take place unless this contract was relinquished; (Record, page 13,) secondly, in consideration of the expenditure of a large sum of money, something over $10,000, in putting up a wire on the poles of the grantor between Philadelphia and New York.

Under such circumstances the grantee of a right to use the wire becomes a purchaser for a valuable consideration, and the right which he acquires cannot be taken away. The language of Chief Justice Gibson, in Rerick *vs.* Kern, 14 S. & R., 267, accurately sets out the nature of such a right. This was the case of a parol license without consideration to use the water of a stream for a saw-mill, in consequence of which the grantee went to the expense of erecting a mill, and it was held that the license could not be revoked, Judge Gibson saying on page 271: "But a license may become an agreement on valuable consideration; as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be percieved. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political

considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by one of personal independence. Hence the judgment of a court of law operates on the right of the party, and the decree of the court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be in a case like this is perceived by considering that a license which has been followed by the expenditure of $10,000 as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth, as many cents. But, besides this risk of insolvency, the law, in barely compensating the want of performance, subjects the injured party to risks from the ignorance or dishonesty of those who are to estimate the quantum of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol, but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent."

The principle here laid down was followed in Huff *vs.* McCauley, 53 Pa. St., 206, where the opinion was given by Judge Strong, and later in Thompson *vs.* McElarney, 82 Pa. St., 174, where the opinion was given by Judge Woodward.

But the question still remains, although the license be irrevocable during the time that it was intended to be granted, of the duration of the grant.

The duration of the right depends upon the character of the thing with respect to which it is to be exercised. In the present case the thing granted was the use of a telegraph wire, and such a wire lasts as long as it is "kept in good order by repairing wire in parts where broken, and taken away, and by replacing insulators where broken." (Record, page 15.) The contracting parties were therefore contracting about a permanent thing, and the right to use it in such a case lasts as long as

the purpose for which it was granted continues. The contract itself, independent of the circumstances under which it was made, and of the subject-matter, contains internal evidence that the parties to that contract contemplated that the use was to be a permanent one.

In the first place, it is provided that it should be kept up and maintained, and (see evidence already quoted) if this is done, it will last just so long as this care is exercised. In the next place, the contract provides for what is to occur at the end of ten years. It also provides for the successors of the then grantees in their firm, or for their incorporation, should they become incorporated. All of these things look to a continuing contract.

The rule in such a case is very well expressed in the case already cited of Rerick *vs.* Kern, by Judge Gibson, 14 S. & R., 272; and the same doctrine is reiterated in Thompson *vs.* McElarney, *supra*, 82 Pa. St., 174.

In this latter case an agreement was made between the defendant and the plaintiff's intestate, whereby the defendant located his mill on the plaintiff's land and agreed to saw the plaintiff's logs at a certain rate in consideration of a right of way for a tramway, and of being allowed to throw his sawdust into a stream passing through the land of the plaintiff's intestate. After the death of the man who owned the land, the plaintiff, who was his successor in title, brought a suit for choking up the creek with sawdust, and on page 177, in giving the opinion, Judge Woodward says:—

"The defendant changed his plans, and made the necessary expenditures in the erection of his mill and building his tramway to the railroad on his faith in the agreement of Beckwith, that he should have the undisturbed use of the water of the stream for a purpose for which both parties knew that use to be indispensable. Nothing appears to indicate that the mill was designed to be other than a permanent structure, and if it was to be permanent, it would seem to follow that the agreement for the disposition of the lumber refuse was to be perpetual. While technically it may be that the nature of the transaction was one for the ascertainment of a jury, it is not doubted that

the facts presented by the record established a license and not an easement."

"As a license, the authorities on the subject prove that it was irrevocable. In Le Fevre *vs.* Le Fevre, 4 S. & R., 241, where a deed had been executed, conveying a right to a water-course through the granted land by courses and distances, it was decided that a verbal agreement entered into between the parties for their mutual accommodation, altering the route of the water-course, could be enforced, provided the agreement had been carried into effect. In Rerick *vs.* Kern, 14 S. & R., 267, it was held, that if a parol license be given, without consideration, to use the water of a stream for a saw-mill, in consequence of which the grantee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the grantor; and if he divert the water to the injury of the grantee, the latter may maintain an action against him. In delivering the opinion in that case, Judge Gibson, said: 'A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation. Having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money a right indefinite in point of duration, which cannot be forfeited for non-user, unless for a period sufficient to raise the presumption of a release.' Both these cases prove that the use of the water of a stream may be made the subject of a license by agreement, and in neither of them were the purpose and method of the use more directly indicated than they are indicated here. The rule of Le Fevre *vs.* Le Fevre and Rerick *vs.* Kern was followed in Swartz *vs.* Swartz, 4 Barr, 353, and in Ebner *vs.* Sticher, 7 Harris, 19. In the course of the opinion in Swartz *vs.* Swartz, it was said that the principle of Rerick *vs.* Kern was, that the revocation of the license would be a fraud, and that to prevent it a chancellor would turn the owner of the soil into a trustee *ex maleficio*."

The case is very like the grant of running powers to one railway by another over the grantor's road, and the rule in this case is very well stated in Llanelly Railway & Dock Company *vs.* The London & Northwestern Railway Company. In the report on appeal to the Lord Justices, 8 Ch. Appeals, 942, Lord Justice James, page 950, says: "I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon the person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract from which it is reasonable to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind—a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relation between the parties.

"But I am of opinion that no such consideration applies to a case in which there is a grant, or an agreement in the nature of a grant of a wayleave, or of running powers, which is only another mode, according to my view of it, of expressing a wayleave. In my view, the implication is quite the reverse. A wayleave or running powers determinable at will or short notice would, in my opinion, be a delusion. Take the most ordinary case of a wayleave. A colliery proprietor desires to have the power of working an adjoining coal field through his lessor's pit, or he desires to have the right of carrying his coals over a piece of land which intervenes between him and a seaport. With that view he enters into a negotiation with his neighbor or his landlord. I take it that both sides will, in so negotiating, know that what the man wants to have is a way-

leave as permanent as the colliery, and both sides must be understood to be negotiating for that kind of wayleave which is the only thing that will suit the mine-owner's purpose."

The same case on appeal to the House of Lords is reported in L. R., 7 E. & I. Appeals, 550.

Among the opinions delivered was that of Lord Selbourn, which was as follows:—

"My lords, an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon one alleging that it is not perpetual the burden of proving that allegation, either from the nature of the subject or from some rule of law applicable thereto. So far as the words go there is here no limit, and if any limit, or the power of fixing a limit is to be implied, it can only be in one or other of these two ways.

"In the present case, the character of perpetuity attaches both to the legal personality of each of the contracting parties, and to the legal character and use of the subject-matter, the railway; and the objects of the agreement are favorably regarded by the law; all such companies having express statutory powers to contract (without any necessary limit of time) for such objects, and being (in the absence of contract) to some extent always under legal obligations, actual or potential, of a like general character.

"All these considerations, so far from introducing any implication from the nature of the subject-matter, or from any rule of law, against the natural import of the unlimited terms (as to time) in which this particular agreement is expressed, tend to confirm the *prima facie* conclusion that an agreement expressed in such indefinite terms is to have unlimited duration. The whole circumstances under which this agreement was made, and its particular terms, support the same conclusion." (Page 567.)

In the absence of anything in this contract, either from the nature of the subject or from any rule of law applicable to it, and in view of what must have been considered, in the minds of both parties, the permanent character of the right contracted for, the opinions just cited seem to be conclusive on the question involved in this case.

If parol testimony is admissible to explain what is not expressed in this contract, to wit, the duration of the right to use the wire, then there can be no doubt of what the parties meant, because the testimony is absolutely conclusive on this point. Two of the officers of the company, who were present when the contract was discussed and made, and complainant himself, agree that the question was considered and discussed, and that it was determined that the right to terminate the contract should be optional with the grantees of the right to use the wire. Whether such parol evidence is admissible depends upon the consideration of two questions. First, whether the interest granted is such an interest in land as must be evidenced by writing under the Statute of Frauds, and if it is not; secondly, whether this case falls within any of the exceptions to the ordinary rule that where parties to a contract have expressed their meaning in writing recourse cannot be had to any parol testimony to explain.

I. This contract, although containing an irrevocable license to make use of a telegraph wire, does not create such an interest in land as to be within the requirement of the Statute of Frauds, that such contracts must be evidenced by writings.

It is very doubtful whether as between the parties to this contract a telegraph wire is to be considered real estate.

Western Union Telegraph Company *vs.* The Railroad Company, 11 Fed. Rep., 2;

Trust Company *vs.* Bankers and Merchants' Telegraph Co., 36 Fed. Rep., 288.

But even if the wire should be held to be real estate, the contract only gives a non-exclusive right to participate in the control of the flow of the electric current over the wire. This is not an interest in real estate.

In Taylor & Waters, 7 Taunton, 374, the right to enter and be present at all performances in a theatre for twenty-one years is held to be a "beneficial use" of land, but not an interest in land within the Statute of Frauds. This case is approved in Thompson *vs.* McElarney, 82 Pa. St., 174. In Sampson *vs.*

Burnsides, 13 N. H., 264, a parol license to enter on land and put down acqueduct logs for the purpose of conveying water from a spring to adjoining land, with the privilege of entering from time to time to examine and repair, was held not to be a sale of lands, or an interest of lands within the statute.

The right to erect a building or dam on land, or to dig a ditch across it, or to divert running water, or to build a bridge, have been held not within the statute.

Merrill *vs.* Bloggett, 34 Vt., 38;
Fence *vs.* Owens, 2 Wis., 250;
Ricker *vs.* Kelley, 1 Me., 117.

II. It is competent, even though this contract is in writing, in the absence of express language in the contract, to show how long the right was to be continued.

The extent of time for performance of a contract obligation is to be determined by a view of all the circumstances in the case, and parol evidence may be admitted to show all the circumstances under which the contract was made, and what the parties thought was a reasonable time for performance. Cooke *vs.* Franklin H. & F. Co., 3 Sumner, 530.

Where a written contract was made to purchase a quantity of wheat at Detroit to be delivered in the spring, parol proof is admissible to show at what time payment was to be made. This does not vary the written agreement, nor contradict it, as by the agreement no time of payment is specified. Halsey *vs.* Hurd, 6 McLean, 102.

In a contract for the sale of a certain number of casks, parol evidence was admitted as to the size of the casks. Keller *vs.* Webb, 25 Mass., 88.

To show how long the license was intended to last does not *contradict* the writing, but merely *explains* it by adding that which is not distinctly expressed.

Finally, the contract is one, performance of which will be enforced by injunction.

Specific performance will be decreed of an irrevocable executed license.

Dark *vs.* Johnson, 55 Pa. St., 164;
Thompson *vs.* McElarney, 82 Pa. St., 174.

Such a contract belongs to that numerous class where a covenant, affirmative in form but negative in substance, is enforced by injunction.

See Kerr on Injunctions, page 521;
Singer Sewing-Machine Co. *vs.* Union Sewing-Machine Co., 1 Holmes, 253;
Joy *vs.* St. Louis, 138 U. S., 1.

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SUPREME COURT, UNITED STATES.

The Franklin Telegraph

vs.

Harrison.

No. 13,477.
October Session, 1891.
No. 319.

The case is in equity, not at law. The law had no mode of compelling performance of a contract, hence equity intervened. The subject is discussed and the reasons in The Duke of Bedford *vs.* The British Museum, 2 My. & Keene, 552, and by Sir Edward Sugden Vend. and Purchasers, 597, Appendix, 799. In the note, page 597, there are an immense number of authorities cited in respect of covenants restricting building and reference may also be made to Spicer *vs.* Martin, 14 Appeal Cas., 12; Renalse *vs.* Cowlisham, 9 Ch. Div., 129; 11 Ch. Div., 866.

The present contract is obviously one of those that is within the rule that a remedy at law is inadequate though the contract is an ordinary reasonable business contract, that so long as the telegraph company do carry on the business they will give the appellants the use of a wire in the manner and on the terms stipulated. This renders it quite unnecessary to inquire if ingenuity can suggest difficulties in defining the character of the contract at law which would enable the appellants to avoid complying with the contract.

R. C. McMurtrie